

**THE LEGAL AND REGULATORY FRAMEWORK OF SURROGACY IN KENYA:**

***THEORY AND PRACTICE***

**FATUMA RASHID**

**G62/7848/2017**

**A RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILMENT OF THE  
REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTERS OF  
LAW(LL.M) OF THE UNIVERSITY OF NAIROBI**

**DECEMBER 2018**



## DECLARATION

I, FATUMA RASHID, do hereby declare that this is my original work and that it has not been submitted for the award of a degree or any other academic credit in any other university.

Sign.....

Date.....

Fatuma Rashid

This research project has been submitted for examination with my approval as the University Supervisor

Signed.....

Date.....

Dr. Nancy Baraza

## **DEDICATION**

I dedicate this work to my Mother, Sarah Rashid, for her trust in me, love and support, without whom this project and my academic achievements would make little sense. And above all, for teaching me the value of hard work, resilience and self-effacement.

## **ACKNOWLEDGEMENT**

My sincerest appreciation and gratitude goes to my supervisor; Dr. Nancy Baraza for her invaluable guidance and direction, without whom this work would not have been accomplished. It was the best learning experience ever, sandwiched by her ceaseless support and understanding.

On a personal note I would like to thank my loving husband Kevin for his love and support, and for the selfless sacrifices he made throughout the period of writing this thesis, a times having to stay alone and look after our beloved son.

To my son, Johari, mummy will never have to be away again.

Special thanks to my friend and classmate, Melissa Ng'ania for cheering me on, and for keeping me motivated, and without whose constant oversight I would have taken longer to finalize this project.

## LIST OF CASES

*A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR

*B v C (Surrogacy: Adoption)* [2015] EWFC 17

*Chepkurui v. Chebet and Kipsa Kapsabet* Res. Mag's Court Div. Cause No. 16 of 1980

*In R: X & Y (Foreign surrogacy)* [2008] EWHC 3030 (Fam);

*In Re Priscilla Nduta Gitwande (Deceased)* Succession Cause 616 of 1997; (2006) eKLR

*JLN & 2 others v Director of Children Services & 4 others* [2014] Eklr

*Maria Gisege Angoi v. Macella Nyomenda* Civil Appeal No. 1 of 1981

*Monica Jesang Katam v. Jackson Chepkwony and Selina Jemaiyo Tirop* [2011] eKLR

*Re B v C (Surrogacy: Adoption)* [2015]

*Re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

*Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam)

*Re X (A child)* [2014] EWHC 3135 (Fam)

*Re Z (A Child) (No 2) Human Fertilisation and Embryology Act: parental order* [2015].

*WKN, CWW & JLN v National Council for Children Services, Director of Children Services and*

*Another*; Nairobi Children's Case No. 205 of 2014

## **LIST OF STATUTES**

Adoption and Children Act (ACA) 2002

Assisted Reproductive Technology Bill, 2016

Births and Deaths Registration Act, 1928

Human Fertilisation and Embryology Act 1990

Surrogacy Arrangements Act 1985

The Births and Deaths Registration Rules 1966,

The Children Act, CAP 141, Laws of Kenya

## LIST OF ABBREVIATIONS

- ACHPR----- African Charter on the Human and Peoples Rights
- ACRWC-----African Charter on The Rights and Welfare of the Child
- AMN----- *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR
- ART----- Artificial Reproductive Technology
- COTS-----Centre and Childlessness Overcome Through Surrogacy
- HFEA-----Human Fertilisation and Embryology Act
- ICCPR-----International Covenant on Civil and Political Rights
- ICESR-----International Covenant on Economic, Social and Cultural Rights
- IVF----- In-Vitro Fertilization
- JLN ----- *JLN & 2 others v Director of Children Services & 4 others* [2014] eKLR
- SA-----South Africa
- UDHR----- Universal Declaration of Human Rights
- UK----- United Kingdom
- WKN-----*WKN, CWW & JLN v National Council for Children Services & 2 others* Nairobi Children’s Case No. 205 of 2014.



## Table of Contents

DECLARATION .....	i
DEDICATION .....	ii
ACKNOWLEDGEMENT .....	iii
LIST OF CASES.....	iv
LIST OF STATUTES .....	v
LIST OF ABBREVIATIONS .....	vi
ABSTRACT.....	xi
CHAPTER ONE .....	1
INTRODUCTION .....	1
<b>1.0 Introduction and Background of the Study</b> .....	1
<b>1.2 Statement of the Problem</b> .....	6
<b>1.3 Objectives</b> .....	7
<b>1.4 Research Questions</b> .....	7
<b>1.5 Hypothesis</b> .....	8
<b>1.6 Theoretical framework</b> .....	8
<b>1.8 Justification of the Study</b> .....	10
<b>1.9 Research Methodology</b> .....	11
<b>1.11 Chapter Breakdown</b> .....	17
CHAPTER TWO: .....	20
THE CONCEPTUAL FRAMEWORK AND THE THEORETICAL FOUNDATIONS OF SURROGACY REGULATION .....	20
<b>2.0 Introduction</b> .....	20
<b>2.1 Conceptual Framework</b> .....	20
<b>2.1.1 Artificial insemination and In vitro fertilization</b> .....	20
<b>2.1.2 Gestational surrogacy, Genetic surrogacy and Surrogacy in the African Context</b> .....	21
<b>2.1.3 Commercial Surrogacy and Non-Commercial Surrogacy</b> .....	23
<b>2.2 THEORETICAL FOUNDATIONS OF SURROGACY REGULATION</b> .....	24
<b>2.2.0 Feminist Jurisprudence and Surrogacy: Introduction</b> .....	24
<b>2.2.1 The Liberal Feminism</b> .....	26
<b>2.2.2 The Radical Feminism</b> .....	27
<b>2.2.3 The Cultural Feminism</b> .....	28

2.2.4 Post Modern Feminism.....	29
2.2.5 Marxist School of Feminism.....	31
2.2.6 Utilitarian School of Feminism .....	31
2.2.7 Liberal Feminism versus Radical Feminism .....	32
2.2.8 The Relevance of the Feminist Jurisprudence.....	32
2.3 Theories of Legal Parenthood.....	33
2.3.1 The Genetic Model of Legal Parenthood .....	33
2.3.2 The Intent Model of Legal Parenthood.....	34
2.3.3 The Property Model of Legal Parenthood.....	35
2.3.4 A Labor Theory of Legal Parenthood.....	36
2.4 Surrogacy: Human Rights Perspective .....	38
2.5 Surrogacy as Reflected under International Human Rights instruments .....	39
2.6 Conclusion .....	40
CHAPTER THREE .....	41
AN ANALYSIS OF THE LEGAL FRAMEWORK ON SURROGACY PRACTICE AND ARRANGEMENTS IN KENYA .....	41
3.0 Introduction.....	41
3.1 The Legal framework on Surrogacy practice in Kenya .....	41
3.1.1 The Constitution of Kenya .....	41
3.1.2 International Human rights instruments.....	44
3.1.3 The Children Act.....	45
3.1.4 The Birth and Death Registration Act .....	47
3.1.5 A discussion of the Children Act, the Birth and Death Registration Act and the Assisted Reproduction Bill .....	48
3.2 Case law on the Recognition and Enforcement of Surrogacy Arrangements .....	49
3.2.1 Introduction.....	49
3.2.2 The WKN Case.....	50
3.2.3 The JLN Case .....	50
3.2.4 The AMN Case .....	52
3.2.5 A critique of the Three Cases: WKN, JLN and AMN.....	54
3.3 Self-Regulation .....	55
3.3.1 Legal Challenges facing the Self-Regulation Model .....	56

<b>3.3.2 The Assisted Reproductive Technology Bill, 2016 .....</b>	<b>58</b>
<b>3.4 Conclusion .....</b>	<b>62</b>
<b>CHAPTER FOUR.....</b>	<b>64</b>
<b>A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK ON SURROGACY IN KENYA, UK, SOUTH AFRICA.....</b>	<b>64</b>
<b>4.0 INTRODUCTION.....</b>	<b>64</b>
<b>4.1 LEGAL FRAMEWORK ON SURROGACY IN THE UK .....</b>	<b>64</b>
<b>4.1.1 An Overview of the Introduction and the Operation of The UK Laws on Surrogacy.....</b>	<b>64</b>
<b>4.1.2 The Ban on Commercial Surrogacy in the UK .....</b>	<b>66</b>
<b>4.2 THE PILLARS OF THE UK’S SUCCESSFUL REGULATION ON SURROGACY.....</b>	<b>68</b>
<b>4.2.1 A comprehensive Institutional and Policy Underpinning the Legal Framework .....</b>	<b>68</b>
<b>4.2.2 Maximum Protection of the Rights of the Surrogate Mother and Same-sex Couples.....</b>	<b>69</b>
<b>4.3 NEGATIVE ATTRIBUTES OF THE UK LEGAL REGIME ON SURROGACY .....</b>	<b>70</b>
<b>4.3.1 Incoherence of the ‘letter and the spirit’ of the regulating statutes .....</b>	<b>70</b>
<b>4.3.2 Laws out of Touch with the Reality and Their Inefficacy in terms of Time and Costs .....</b>	<b>71</b>
<b>4.3.3 The Discriminatory Nature of some Legal Requirements for granting a Parental Order</b>	<b>72</b>
<b>4.3.4 UK’s prohibition of Commercial Surrogacy .....</b>	<b>74</b>
<b>4.3.5 Inefficiency of the UK Laws on International Surrogacy .....</b>	<b>76</b>
<b>4.4 THE LEGAL FRAMEWORK ON SURROGACY IN SOUTH AFRICA.....</b>	<b>77</b>
<b>4.4.1 An Overview of the Surrogacy Laws in South Africa.....</b>	<b>77</b>
<b>4.5 THE POSITIVE ATTRIBUTES OF THE SOUTH AFRICAN REGIME .....</b>	<b>79</b>
<b>4.5.1 Legal Framework underpinned by Consultative Policy Framework.....</b>	<b>79</b>
<b>4.5.2 A robust and flexible jurisprudence on the interpretation of surrogacy laws.....</b>	<b>80</b>
<b>4.5.3 Optimal Protection for the Rights of the Parties to The Surrogacy Arrangement .....</b>	<b>80</b>
<b>4.5.4 Insulation against Surrogacy Tourism and Professionalization of the Industry .....</b>	<b>82</b>
<b>4.5.5 Court’s Social Engineering Role and the Efficacy of the regime in terms of Time and Costs .....</b>	<b>83</b>
<b>4.6 THE NEGATIVE ATTRIBUTES OF THE SOUTH AFRICAN REGIME .....</b>	<b>84</b>
<b>4.6.1 The Inappropriateness of the courts as Screening Devices .....</b>	<b>84</b>
<b>4.6.2 The Discriminatory Nature of Genetic Link Requirement .....</b>	<b>85</b>
<b>4.6.3 Stand on Commercial Surrogacy and International Surrogacies .....</b>	<b>86</b>
<b>4.7 Conclusion .....</b>	<b>87</b>

CHAPTER FIVE .....	88
5.0 CONCLUSIONS AND RECOMMENDATIONS .....	88
<b>5.1 RESEARCH FINDINGS</b> .....	88
<b>5.2 RECOMMENDATIONS</b> .....	95
<b>5.2.1 Parliament</b> .....	95
<b>5.2.2 Courts</b> .....	96
<b>5.2.3 Professionals, Hospitals and Doctors</b> .....	96
<b>5.2.4 The role of Civil Societies</b> .....	97
<b>5.2.4 International Communities</b> .....	97
6.0 BIBLIOGRAPHY .....	98
6.1 Books .....	98
6.2 Journals .....	98
6.3 Special Papers .....	100
6.4 LLM Thesis.....	100
6.5 PhD Thesis .....	100
6.6 Reports .....	100
6.6 Newspapers .....	101
6.7 Online Sources .....	101

## **ABSTRACT**

Despite the growing acceptance of surrogacy practice in Kenya for the last decade, there is little development in the legislative, institutional and policy framework on the practice. The study investigates the impact of this legal position on the recognition and realization of the constitutional right to reproduction health, right to form a family, and the right to privacy and human dignity. It is premised on the hypothesis that the Kenyan legal framework on surrogacy hinders the recognition and enjoyment of these constitutional rights. The study utilizes a combination of the doctrinal and comparative research methodologies to conduct an in-depth desk review on the regulation of surrogacy arrangements in Kenya, and to investigate the best lessons, which Kenya can learn from UK and South African surrogacy regimes, respectively.

The study reveals that although the surrogacy practice has a constitutional basis, there is no substantive legislative and policy frameworks which materialize the enjoyment of the constitutional rights. Instead, the practice has so far survived at the mercy of social engineering by the courts coupled by a self-regulation model designed by key stakeholders. However, the jurisprudence emanating from the courts is amorphous, and the self-regulation model has failed to address and curb the rampant emergence of ‘illegal surrogacies.’ The study reveals that Kenya has much to learn from the South African and the UK’s experience on surrogacy regulation. Under both jurisdictions, their surrogacy regimes are backed by a concrete legislative, institutional and policy framework, which offers maximum protection of the rights of the parties to the surrogacy arrangement irrespective of their sexual orientation. Nonetheless, South Africa offers more lessons; it makes a distinction between full and partial surrogacy by granting more rights to a genetic surrogate mother, courts act as screening devices on approval of surrogacy arrangements, it has professionalized the practice and it offers optimal certainty on the transfer of legal parenthood from the surrogate mother to the commissioning parents.

## CHAPTER ONE

### INTRODUCTION

#### 1.0 Introduction and Background of the Study

There is no universal definition of the term ‘surrogacy,’ but there is a general agreement on the elements of the term. It refers to an arrangement whereby a woman carries a pregnancy and hands over the child to a contracted party upon birth.<sup>1</sup> Similarly, it has been conceived as where a woman agrees to bear a child for another person(s), by subsequently abandoning the child at birth by way of surrendering the child to the commissioning parents.<sup>2</sup> Further, the term has been defined as the arrangement under which a woman agrees to conceive and carry the pregnancy to term for some other person(s), and delivers the child immediately after its birth.<sup>3</sup> But the most favorite definition for the purposes of this study is the definition by Warnock Report which conceives surrogacy as a practice whereby a woman agrees to conceive and carry the pregnancy for another person with the understanding and intention of handing over the child upon birth.<sup>4</sup>

Surrogacy in the African context has been in existence since time immemorial, in the form of woman-to-woman marriages, which is very much embedded in the African culture. A woman-to-woman marriage is a traditionally recognized union between two women, whereby one woman marries the other and pays dowry to effect the marriage.<sup>5</sup> The underpinning rationale behind the

---

<sup>1</sup> Kushal Singla, ‘Legal Issues in Commercial Surrogacy: An Analytical Study’ Vol. 2 (5) *International Journal of Law and Legal Jurisprudence Studies* p. 164.

<sup>2</sup> Claire de La Hougue and Caroline Roux, Surrogate Motherhood and Human Rights: Analysis of Human, Legal and Ethical Issues (2015) *European Commission Law Journal* p. 4.

<sup>3</sup> Yehezkel Margali, ‘From Baby M to Baby M(anji): Regulating International Surrogacy Agreements’ *Journal of Law & Policy* p. 3.

<sup>4</sup> Warnock DM, ‘Report of the committee of inquiry into human fertilization and embryology’ (Command of Her Majesty 1984) p. 42.

<sup>5</sup> Jackton B. Ojwang and Emily Nyiva Kinama, ‘Woman-to-woman Marriage: A Cultural Paradox in Contemporary Africa’s Constitutional Profile’ (2014) Vol. 47 (4) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America* p. 416.

cultural practice is to ensure the continuation of the family line of the woman who has married the other, to enhance the integrity of the family institution and grant the participants social fulfillment.<sup>6</sup> A key fundamental assumption about the institution of woman-to-woman marriage is that it was a ‘response to social hardship’ through which they offered solutions to challenges of succession and kinship.<sup>7</sup> These marriages legitimize children in the community by offering a direct linkage of the children to a particular lineage.<sup>8</sup> Any children born to the woman in respect of whom dowry has been paid are regarded as the children of the woman who paid the dowry.<sup>9</sup> The offspring belonged to the female husband and therefore also to the lineage of her father and not that of their biological father.<sup>10</sup>

This African concept of surrogacy has been widely acknowledged and embraced as a legitimate social practice, through which parties to the woman-to-woman marriage can exercise their right to family and achieve the enjoyment of family life. Courts have held that woman-to-woman marriage are valid marriages in all respects.<sup>11</sup> In addition, courts have rejected the contention that the very concept of woman-to-woman marriage is repugnant to justice and morality since the marriage serves the social functionality, and it does not entail any sexual partnership between the two women.<sup>12</sup> Findings<sup>13</sup> that the custom is repugnant to justice and morality has been dismissed as erroneous, and a limited interpretation of the repugnancy clause.<sup>14</sup> Recent jurisprudence emanating

---

<sup>6</sup> Ibid. See also Nancy Baraza (Kenya Law Reform Commission) ‘Family Law Reforms in Kenya: An Overview’ Presentation at Heinrich Böll Foundation's Gender Forum in Nairobi.

<sup>7</sup> Ibid, p. 427.

<sup>8</sup> Monicah Wanjiru Kareithi, ‘A historical-legal analysis of woman-to-woman marriages in Kenya’ (Doctor Legum (LL.D)University of Pretoria, 2018) p. 107.

<sup>9</sup> *Eugene Cotran*, *The Law of Marriage and Divorce* (Vol. 1), London 1968, p. 117.

<sup>10</sup> Monicah Wanjiku Kareithi, (n 8) p. 108.

<sup>11</sup> *Chepkurui v. Chebet and Kipsa* Kapsabet Res. Mag's Court Div. Cause No. 16 of 1980.

<sup>12</sup> *In Re Priscilla Nduta Gitwande (Deceased)* Succession Cause 616 of 1997; (2006) eKLR

<sup>13</sup> *Maria Gisege Angoi v. Macella Nyomenda* Civil Appeal No. 1 of 1981.

<sup>14</sup> Francis Kariuki, ‘Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems’ pp. 7-8.

from the courts<sup>15</sup> under the new constitutional order conceive the right to practice these marriages as an aspect of cultural rights provided under the Constitution.<sup>1617</sup>

The African concept of surrogacy has changed overtime to include and embrace the technological advancements in human reproductive health. Essentially, this modern-day surrogacy involves arrangements whereby a woman agrees to conceive through assisted reproductive technologies, with the understanding that the resultant child will be surrendered and handed over to other person(s), who shall be the child's legal parents.<sup>18</sup> The process may employ several medical procedures, mostly either In-Vitro Fertilization (IVF)<sup>19</sup> or Artificial Reproductive Technology (ART).<sup>20</sup> These two distinct medical procedures have led to the two types of surrogacy; Gestational surrogacy and traditional surrogacy, which are done through ART and IVF respectively.<sup>21</sup> The practice has also been categorized as either commercial surrogacy<sup>22</sup> or altruistic surrogacy,<sup>23</sup> depending on the nature of the arrangement between the parties, with respect to any payments made to the surrogate mother for rendering the surrogacy services.<sup>24</sup>

---

<sup>15</sup> *Monica Jesang Katam v. Jackson Chepkwony and Selina Jemaiyo Tirop* Mombasa H.C. Succ. Cause No. 212 of 2010; [201 1] eKLR.

<sup>16</sup> Jackton B. Ojwang and Emily Nyiva Kinama (n 5) p. 423.

<sup>17</sup> Constitution of Kenya, Article 11 (1).

<sup>18</sup> Laura R. Woliver, 'Reproductive Technologies and Surrogacy: Policy Concerns for Women' (1990) vol. 8 (2) *Politics and the Life Sciences* p. 185.

<sup>19</sup> The procedure involves the fertilization of an egg outside the body of a woman, after which the fertilized egg is implanted into her uterus through her vagina.

<sup>20</sup> The procedure involves the fertilization of an egg while inside the womb, through the injection of sperms into the vagina of the woman.

<sup>21</sup> Kushal Singla, 'Legal Issues in Commercial Surrogacy: An Analytical Study' Vol. 2 (5) *International Journal of Law and Legal Jurisprudence Studies* p. 164.

<sup>22</sup> Under this category, the surrogacy arrangement resembles any other commercial contract, the surrogate mother makes a financial gain from the arrangement and the process may involve other third parties like brokers, who might facilitate the negotiation of the arrangement for a fee.

<sup>23</sup> Under this category, the surrogate mother does not stand to make a financial gain from the bargain, she is not entitled to receive any monetary compensation other than for reasonable expenses incurred and the practice prohibits the involvement of third parties in the process of hooking the parties and facilitating the arrangement.

<sup>24</sup> Aneesh V. Pillai, 'Surrogacy under Indian Legal System: Legal and Human Concerns' (PhD Thesis, Cochin University 2013) p. 7.



The practice of the contemporary surrogacy has gained relevance in Kenya, as evident from the provisions of surrogacy services within the country and sometimes the liberal approach by the press and mass media. The first Kenyan birth by assisted reproduction technologies happened in 2006 while the first surrogacy child was born in 2007. By 2015, Kenyan Hospitals had done 18 surrogate births by which 28 children had been born.<sup>25</sup> At least five medical centres offer fertility treatment in Kenya; The Aga Khan Hospital, Nairobi Hospital, Mediheal Fertility centre, Eldoret fertility centre and the Nairobi IVF centre.<sup>26</sup> These centers have enacted soft law procedures and guidelines, mostly characterized by in-house counselling, through which they inform their clients of their legal rights and duties particularly in a surrogacy arrangements. These centers, together with other stakeholders have established some form of self-regulation, through which they set the standards for the new market.

Kenyan courts have since recognized these societal advancements by recognizing and enforcing surrogacy arrangements. In 2014, the High Court recognized two surrogacy arrangements. In the first case, the court ordered the names of the commissioning parents be entered into the birth notification as well as the birth certificates of the newborns.<sup>27</sup> In the second case, the court found the Director of Children had violated the rights of the commissioning parents by taking the newborns away from them.<sup>28</sup> In a later case, the Court, while not disputing the acceptance of the practice in Kenya, was keen not to nullify a surrogacy arrangement, and it went further to advice the parties on the best way to attain legal parenthood over surrogacy babies.<sup>29</sup>

---

<sup>25</sup> Robai Lumbasyo, 'Towards a Kenyan Legal and Ethical Framework on Surrogacy' (LLM Thesis, University of the Witwatersrand 2015) p.5.

<sup>26</sup> Wathika Linda Wanjiku, 'The determination of Legal Parenthood Following Surrogacy Arrangements in Kenya' (LLB Thesis, 2017 Strathmore University) p. 22.

<sup>27</sup> *WKN, CWW & JLN v National Council for Children Services, Director of Children Services and Another*; Nairobi Children's Case No. 205 of 2014.

<sup>28</sup> *JLN & 2 others v Director of Children Services & 4 others* [2014] eKLR

<sup>29</sup> *A.M.N & 2 others v Attorney General & 5 others* [2015] eKLR

Even with this societal acceptance and the significant role of the courts in social engineering, the practice of surrogacy in Kenya is encountering various challenges, which have had ripple effects on the enjoyment of the constitutional right to have a family couple, right to privacy and human dignity, with the right to access reproductive health.<sup>30</sup> In 2015, a Kenyan couple for which newborn twins had been born could not acquire parental status under the UK laws, necessitating the commissioning parents to adopt their own child.<sup>31</sup> Similarly, in the same year, another pair of commissioning parents had to get court orders, for them to get back the newborns that had since been taken to a children's home against their wish.<sup>32</sup> In 2018, parties to a surrogacy arrangement were charged with child trafficking, despite having had a comprehensive surrogacy arrangement.<sup>33</sup>

The parliament has also acknowledged the relevance of the practice, as demonstrated by the introduction of surrogacy bills. In 2014, the In-Vitro Fertilization Bill was introduced,<sup>34</sup> which was later renamed 'The Assisted Reproductive Technology Bill.'<sup>35</sup> However, this bill has not been passed, leaving the regulation of surrogacy still unattended to and in a wanting state. Largely, this delay has been inordinate, considering the court's signal that the parliament has a duty to provide for the rights of the parties to a surrogacy arrangement through legislation.<sup>36</sup>

---

<sup>30</sup> Constitution of Kenya Article 45, 31 and 22.

<sup>31</sup> JLN (n 28).

<sup>32</sup> WKN, CWW & JLN (n 27).

<sup>33</sup> Stella Cheron, 'Mombasa woman gives birth, gives away baby to Chinese' *Daily Nation* (July 31 2018).

<sup>34</sup> National Assembly Bill No.36 of 2014.

<sup>35</sup> National Assembly, Programme of Parliamentary Business Week commencing Tuesday, July 19, 2016 p.23.

<sup>36</sup> JLN (n 28).

## **1.2 Statement of the Problem**

The traditional African conception of surrogacy under the woman-to-woman marriages has changed overtime with technological advancement in human reproduction. Unlike the traditional concept which is readily sanctioned by African culture and indorsed by the courts, the contemporary surrogacy is yet to receive such formal recognition in terms of legislative, institutional and policy framework, despite its presence in the last decade, save for the courts which have been engaging in some form of social engineering. However, the social engineering by the Kenyan courts is not efficient to cement the societal changes, as the courts have offered an unstructured and amorphous jurisprudence on the approach to the surrogacy practice. Consequently, there is need for a specific legislative enactment, now, whose main objective is to facilitate and accelerate social engineering on this area, given that law is the most effective tool of social engineering.

The study seeks to investigate the impact of the absence of law in this area on the enjoyment and enforcement of the constitutional right to reproduction health, the right to culture, the right to form a family, and the right to privacy and human dignity, with respect to surrogacy arrangements. In addition, the study seeks to examine the extent to which the Kenyan regime deviates from the basic tenets of an ideal surrogacy regulation regime. In this respect, the study investigates the efficacy of the Kenyan legal framework on surrogacy, with a view to reveal the extent to which the framework protects and promotes the constitutional rights to reproductive health, to establish a family and the right to human dignity. The study seeks to carry out a comparative analysis on the legal frameworks of South Africa and the UK. The analysis is done with a view to identify the necessary legislative reforms necessary to align Kenyan regime with the best practices in these two jurisdictions.

### **1.3 Objectives**

1. To examine the extent to which the Kenyan legislative, institutional and policy framework is efficient in regulating surrogacy arrangements.
2. To investigate the legal implications of the current status of law on surrogacy, with respect to the protection of the constitutional right to form a family, the right to reproductive health and the right to human dignity and privacy.
3. To examine the extent to which the South Africa and the United Kingdom experiences on regulation of surrogacy provide lessons for Kenya with respect to attaining efficiency in the regulation of surrogacy arrangements.
4. To propose the necessary reforms on Kenyan legislative, institutional and policy framework with a view to attain an efficient regulation of surrogacy arrangements.

### **1.4 Research Questions**

1. To what extent is the Kenyan legislative, institutional and policy framework efficient in regulating surrogacy arrangements?
2. What are the legal implications of the status of law on surrogacy, with respect to the protection of the constitutional right to form a family, the right to reproductive health and the right to human dignity and privacy?
3. To what extent can the South Africa and the United Kingdom experiences provide lessons for Kenya with respect to attaining efficiency in the regulation of surrogacy arrangements?
4. What are the necessary reforms on Kenyan legislative, institutional and policy framework with the view of attaining an efficient regulation of surrogacy arrangements?

## **1.5 Hypothesis**

This study proceeds from the following hypotheses:

1. There is no law on Surrogacy arrangements in Kenya.
2. Although the Constitution provides for a structure under which surrogacy practice can be based, the legislative framework fails to explicitly recognize the right to engage in surrogacy.
3. The UK and South Africa can offer lessons, which Kenya can emulate for the purpose of reviewing and establishing a national legislation and policy on surrogacy arrangements.

## **1.6 Theoretical framework**

This study is guided by the Feminist legal theory. The theory entails both Cultural Feminism and Liberal Feminism. Cultural Feminists posit that the case of women's oppression is biological. That their body being the material base upon which reproduction takes place, its sexuality is controlled by men through the institution of marriage and family. They further argue that owing to the patriarchal system of the society, the male culture dominates and oppresses women and socio-economic field. Oppression of women is sexual and the primary aim of cultural feminism is to dismantle the sex class system. They believe in equal partnership of men and women who have separate existence and different functions.<sup>37</sup>

The liberal feminists on the other hand, advance the fact that couples without children can use modern technology to form a family. The liberal feminists advocate for the same treatment of both genders through giving both men and women the right to choose or not choose to engage in

---

<sup>37</sup> Alcoff Linda, 'Cultural Feminist Versus Post structuralism the identity crisis of Feminist Theory' (1988) Vol.13 *Journal of Women in Culture and Society* p. 406.

something instead of out rightly blaming or discriminating them due to their gender.<sup>38</sup> It draws from liberal ideas and philosophy, which endorsed equal opportunities in the public and individual capacities. The rationale is short and simple: do not treat women differently from a similarly situated man since even though men and women are different, they are not different in a way that mattered legally.

The liberal feminists embrace surrogacy as an alternative method of reproductive. They argue that couples who are unable to get children naturally should not be condemned to ridicule.

They agree that many families continue to suffer emotionally yet such families should use the alternative methods of reproduction to form families and be happy. As infertility is largely blamed on women, surrogacy would come in handily to lift the burden. The radical feminists would embrace commercialized surrogacy. In this case, a woman would choose to be part of a surrogacy arrangement either on medical grounds or in circumstances where parties who would otherwise get children naturally agree to such an arrangement for other reasons such as women who are not ready to embrace body changes that come with child bearing.

The liberal feminist's position on surrogacy has been criticized by Natural Law theorist, especially St. Thomas Aquinas.<sup>39</sup> Natural law theorists argue that it is God who provides life and therefore surrogacy would be ungodly. They believe that everything in nature reflects the order by which God directs and that nature should not be interfered with. They subscribe to the natural way of getting children hence they do not subscribe to alternative methods of reproduction. By allowing such alternative methods, individuals would be comparing themselves to God; who is eternal.

---

<sup>38</sup> Janice Raymond, 'At issue: Reproductive Technologies, Radical Feminism and Socialist Liberalism' Vol.2 (2) 1989 *Reproductive and Genetic Engineering: Journal of International Feminist Analysis* p. 34.

<sup>39</sup> Sarah Borden, "Edith Stein and Thomas Aquinas on Being and Essence," (2008) 82 *American Catholic Philosophical Quarterly* p.88.

The study will utilize the liberal feminist theory to advance the need for a legislative framework on surrogacy. The theory will underscore the theoretical basis and principles on the basis of which reproduction rights can be justified. To crown it all, both the liberal and cultural feminist positions on surrogacy will guide the study to illuminate the crucial link between the constitutional right to reproduction decisions and human emancipation as a fundamental human right.

### **1.8 Justification of the Study**

Surrogacy practice is fast gaining roots in the Kenyan society, and has been opted by a sizable number of families. However, the practice is marred by legal uncertainty and Kenyans have consequently resulted either to other unlawful means of acquiring legal parentage or seeking the service elsewhere. This necessitates the establishment of a comprehensive legal, policy and institutional framework on surrogacy. Further, under the Social Pillar of the Kenya Vision 2030, the Government has planned to provide equitable and affordable health care at the highest affordable standard to her citizens as well as prioritizing the area of science, technology and innovations. Surrogacy practice falls squarely under this development agenda, as the surrogacy procedure entails both the technological aspect and the health care aspect.

First, this study will be instrumental to policy makers as they draft and formulate the optimal legislation for the surrogacy practice. Further, the study will be useful to judges and administrative authorities, especially when adjudicating on the rights and duties under a surrogacy agreement. For the judges, the study will stipulate the very fundamental principles which must inform the court as they undertake their social engineering role, especially when the parliament is reluctant to pass a law.

## 1.9 Research Methodology

The research adopts a doctrinal research methodology, chiefly the desk review method. It seeks to analyze the Kenya legal framework with a view to understand the extent to which the framework provides for surrogacy arrangements and for the protection of the constitutional right to reproductive health, right to privacy and the right to form a family. It critically reviews Government reports, Government policies and subsidiary legislation. On secondary sources of information, the study reviews text books, journals articles, and conference papers and reports.

The research will also be based on a comparative study of Kenya, South Africa and the United Kingdom. South African jurisprudence is very relevant in the Kenya context, considering the much Kenya has borrowed from South Africa. The Kenyan Constitution was borrowed heavily from the South African Constitution.<sup>40</sup> In addition, Kenya has successfully borrowed from the South Africa's Children's Act and the National Health Act. Furthermore, she is arguably the most advanced African country in terms of interpretation and protection of Constitutional human rights. The UK experience on surrogacy is very relevant in Kenya, given that Kenya has traditionally looked to the UK on matters of legislation.<sup>41</sup> Further, UK has an advanced legislation for the practice of surrogacy to an extent that it might be having the best legal and policy frameworks globally. This notwithstanding, the study seeks to investigate on the best practices which can be borrowed from the two jurisdictions, being cautious of the different cultural and social-economic realities of the three jurisdictions.

---

<sup>40</sup> Richard Kariuki Kibuchwa & another v Governor, Kirinyaga County & 2 others [2015] eKLR para 7. See also Cornellilj, 'International Law in South Africa and Kenya' (2013) *Cornell International Law Journal Online* <<http://cornellilj.org/international-law-in-south-africa-and-kenya/>> Accessed on 1<sup>st</sup> December 2018. See also Teddy Musiga, 'Kenya-South Africa dialogue on devolution' (2016) Vol. 2 (1) *Strathmore Law Journal* p. 229. (the writer argues that the Kenyan Constitution liberally borrowed from the South Africa).

<sup>41</sup> Muthomi Thiankolu, 'Towards a Legal Framework on Assisted Human Reproduction in Kenya: Some Thoughts on the Law, Technology and Social Change' (2007) p. 3.



## 1.10 Literature Review

Although there is relatively extensive literature on the concept and the practice of surrogacy, both nationally and internationally, there is scarce literature on the efficacy of the Kenyan legal framework on surrogacy. Much of the relevant literature on this subject features the position of the law before the promulgation of the 2010 Constitution and before the pronouncements of Kenyan Courts in the AMN, JLN and the WKN cases. As a result, this literature does not incorporate the constitutional rights to form a family, right to culture, right to reproductive health and the right to privacy and human dignity, all of which have brought fundamental change on the Kenyan legal framework on surrogacy. Further, most of the literature posits the position of the law before the enactment of the Assisted Human Reproduction Bill and do not reflect the radical societal changes which have since occurred in the perception of this matter.

Brandel<sup>42</sup> summarizes the surrogacy debate as the fundamental tension between autonomy and paternalism. The study opines that lack of regulation on surrogacy might sent surrogacy underground, and that the only concern for policy makers is not whether they should legislate on the matter, but how to accommodate the new developments. The paper concludes that carefully drafted legislation can minimize the potentially exploitative aspects of surrogacy as well as protecting the interests of the parties to a surrogacy arrangement.

Joan<sup>43</sup> argues that surrogacy practice can be founded on the constitutional right to family, right to life, the best interests of the child and the right to highest attainable standard of health. However, her analysis is quite limited, as the study does not investigate the extent to which the surrogacy practice could be based on the constitutional right to culture, the right to human dignity and the

---

<sup>42</sup> Abby Brandel, *Legislating Surrogacy: A Partial Answer to Feminist Criticism*, 54 Md. L. Rev. 488 (1995)

<sup>43</sup> Joan Oburu, 'Legal Parentage in Surrogacy Arrangement: An Immediate Concern in Kenya' (LLM Thesis, University of Nairobi 2016)

right to privacy. Under the right to culture, she does not touch on how different Kenyan ethnic communities practiced surrogacy under the woman-to woman customs and she does not demonstrate how that custom has evolved with the technological advancement in the human reproduction. Consequently, her analysis fails to link the contemporary surrogacy practice to the conventional African cultural conceptualization of surrogacy in the nature of the woman-to-woman marriages.

In addition, her study offers a limited examination of the adequacy of the Kenyan legal framework. In a rather general way, she argues that the Children Act, the Registration of Births and Deaths Act and the Succession Act impliedly protect the rights of the parties to a surrogacy arrangement. In her analysis, her study does not offer a particular analysis of the three statutes with respect to the exact extent to which they provide for and promote surrogacy practice. Her argument cannot be justified given that the three statutes operate under the assumption that child bearing has been done through the conventional way and they were enacted at a time when the parliament did not contemplate the contemporary surrogacy practice. Further, the study focus restrictively on the parental rights and responsibilities of the commissioning parents and the surrogate mother, leaving unattended the legal concerns of public policy, the rights of the child and the rights and the obligations of the state in the surrogacy arrangement.

Robai<sup>44</sup> argues that surrogacy practice in Kenya is stifled in uncertainty, a state that has occasioned complex legal and ethical issues. The study finds that the Kenyan legal framework is inadequate and legislative reforms should be initiated to embrace uniformity in the practice and protect all the parties to the arrangement. She posits that absence of legal framework has exposed the practice to

---

<sup>44</sup> Robai Lumbasyo (n 25) p.5.

corruption and other exploitative activities. She argues that Kenya should design relevant legal framework, upon which the practice of surrogacy will have an enabling environment.

However, the study focus more on the ethical dilemma of surrogacy arrangements and it does not discuss the legal questions which evolve around the concept of surrogacy. Also, the study's conclusion on the inadequacy of the Kenyan legal framework is not well founded, given that the study does not critically analyze the legal framework and the jurisprudence emanating from the High Court.

Muthomi<sup>45</sup> investigates the new technological advancements in the field of human reproduction, with a view to make a case for regulation of surrogacy and assisted human reproductive generally. Essentially, he argues that the Kenyan legal system has failed to keep abreast with socio-economic developments with respect to emergence of human reproductive technologies. He argues that legislating on surrogacy poses two weighty and controversial issues. The first difficulty is striking the optimal balance between legislation, regulation and reproductive freedom and the second difficulty is understanding the interplay between ethical considerations and legislative intervention in human reproduction.

Furthermore, he argues that legislation on surrogacy practice is justified under three grounds. First, the state has a legitimate interest in regulating reproductive freedom, for the purpose of preventing harm to society. Further, the state has an interest in ensuring the high standards of treatment, with a view to enhance safety and protect its citizens from risky or harmful procedures. Lastly, he argues that the intervention of a third party in surrogacy procedures removes the matter from private domain to public domain, necessitating government intervention. Informed by the ethical

---

<sup>45</sup> Mithomi Thiankolu, 'Towards a Legal Framework on Assisted Human Reproduction in Kenya: Some Thoughts on the Law, Technology and Social Change' (2007).

considerations around surrogacy, the paper proposes legislative reforms backed by all the stakeholders. Alongside this, he emphasizes that any legislative enactment or reform must be fundamentally informed by the peculiar needs and circumstances of the Kenyans with respect to Kenya's unique social and cultural realities.

His key argument is that Kenya has not worked on the legal framework with the view to bring it at par with the technological advancements in human reproduction, and that the legislative, institutional and policy framework on surrogacy does not attend to the socio-economic realities of the contemporary Kenyan society. While these arguments were justified then, his study does not reflect the landmark advancements, which has occurred since the publication of his work in 2007. Much legal developments have occurred since the time of his research, with respect to the legal rights on surrogacy practice in Kenya; the promulgation of the Constitution which grants key fundamental rights and freedoms, and the more conspicuous societal changes with the courts taking a leading role in the social engineering. The study does not incorporate the impact of the recent jurisprudence emanating from Kenyan Courts on surrogacy practice, especially in the cases of AMN, JLN and WKN. In addition, the parliament has since demonstrated its intention to bring the Kenyan law at par with the technological advancements, through the generation of the Assisted Human Reproduction Bill.

He argues that the right to participate in assisted human reproduction is based on the constitutional right to life, right to liberty and right to privacy. In many respects, this argument is limited as it does not include the constitutional right to family, right to reproductive health and the right to culture. In addition, his study offers a general and an extensive overview on the ideal regulation of assisted human reproduction while offering a peripheral discussion on surrogacy as a subject on

its own.<sup>46</sup> As a result, the study does not attend to the unique rights, duties and obligations, which are inherent in a surrogacy arrangement. Furthermore, although he argues that Kenyans have resulted to self-regulation model with respect to regulating modern human reproductive technologies, his research does not investigate the legal challenges ailing the self-regulation model as a tool of regulating surrogacy arrangements.

Lastly, his study, largely offers a comparative analysis of the Kenyan and the UK jurisdictions, with a view to outline the lessons, which Kenya should emulate from the UK experience on surrogacy regulation and human reproduction technologies generally. However, the study does not first offer an extensive analysis of the Kenyan laws, with a view to reveal the extent to which the legislative framework deviates from the constitutional rights and freedoms. The study does not analyze the extent to which the children's Act and the Registration of Births and Death Acts undermine the enjoyment of the constitutional rights in the surrogacy practice.

Evelyne Opondo<sup>47</sup> offers an in-depth analysis of the law regulating IVF in Kenya, the legal factors around IVF and how these factors affect women. The study conducted interviews on lawyers and doctors who have experience and are knowledgeable on the IVF services, backed by first-hand experiences of persons who had sought IVF services. The study found that though the practice is generally helpful, it poses serious legal, ethical and moral issues through which the procedures could amount to human rights abuse if not addressed. In addition, the study argues that there is no specific legislative framework on IVF and the practice has been left to self-regulation administered by key stakeholders. Further, the study argues that the lack of relevant laws on IVF could be attributed to several reasons; the government's reluctance in funding the taskforce on Regulatory

---

<sup>46</sup> Ibid, pp. 3-18.

<sup>47</sup> Evelyne Opondo, 'The Legal Challenges of New Reproductive Technologies in Kenya' (Master of Arts Thesis, University of Nairobi 2010).

Framework for Assisted Reproductive Technology, addressing infertility is not a major priority under the Kenya National Reproductive Health Policy and the general occurrence that the law usually lags behind societal changes.<sup>48</sup>

Essentially, she argues that the legislative languages of various statutes reflect the conventional way of child bearing and do not reflect the new medical technologies. However, the study's argument that there is no legal framework on IVF is rather too general and erroneous, as the study does not reflect the legislative advancement, which has taken place since the time of the study. Key of the developments is the promulgation of the Constitution, which came in after the publication of the study and which has radically changed the landscape on these area, by providing for the constitutional right to form a family, right to access reproductive health services and the right to culture among others. Further, the study does not reflect the much developments, which have been brought by subsequent court pronouncements and the parliament's intention to enact a law on assisted human reproduction.

### **1.11 Chapter Breakdown**

This study comprises of five chapters.

The first chapter outlines the agenda of the study. It will encompass the background of the study and a statement of the problem under study, which will articulate the specific legal problem under investigation. It will also constitute an elaborate literature review, which will exhibit the gap in the literature. In addition, the chapter will comprise an outline of the objectives of the study and its

---

<sup>48</sup> Ibid, p. 32.

hypothesis, the basic assumptions upon which the study is taken. Finally, the chapter will conclude with a discussion on the methodology that will be adopted for carrying out the study.

The second chapter starts with an introductory paragraph that will state the trajectory of the chapter and its scope. The chapter first discusses the concept of surrogacy. Further, it investigates the jurisprudential basis underpinning surrogacy, the foundation upon which the study rests. In addition, the chapter discusses the philosophical basis for surrogacy after which it offers a comprehensive discussion of surrogacy from a Human Rights' perspective. The chapter concludes with a summary of the chapter.

The third chapter starts with an introductory paragraph that states the trajectory of the chapter and its scope. The chapter essentially investigates and analyzes the Kenyan legal framework on surrogacy. The first part of the chapter offers a critical analysis of extent to which the legislative, institutional and policy framework regulates surrogacy practice in Kenya. This part features an analysis of the legislative framework, and the Kenyan case law on issues of surrogacy. The second part critically analyzes the domesticated international instruments on surrogacy and the extent to which they regulate surrogacy in Kenya. The chapter concludes with a summary of the chapter.

The fourth chapter starts with an introductory paragraph, which articulates the trajectory of the chapter and its scope. Chiefly, the chapter does a comparative analysis on the legal framework on surrogacy in Kenya, South Africa, and United Kingdom. First, the chapter justifies the choice of the two jurisdictions and the relevance of each in the Kenyan context. Further, it investigates the judicial treatment of surrogacy disputes in these three jurisdictions. Through this comparative analysis, the study identifies the best practices, which Kenya can emulate. The chapter concludes with a summary of the chapter.

The fifth chapter starts with an introductory paragraph, which will state the trajectory of the chapter and its contents. It contains a conclusion of the study and a summary of its findings. Alongside this, the chapter recommends the necessary amendments to the Kenyan legal framework on surrogacy with a view to align with the best practices identified from South Africa and UK.



## CHAPTER TWO:

### THE CONCEPTUAL FRAMEWORK AND THE THEORETICAL FOUNDATIONS OF SURROGACY REGULATION

#### 2.0 Introduction

The chapter offers an in-depth and comprehensive discussion of both conceptual and theoretical frameworks on the practice of surrogacy. Under the conceptual framework, the chapter has described the different forms of surrogacy and a detailed elaboration of the key concepts, which are key and central to the surrogacy discourse. Under the theoretical framework, the chapter offers a critical analysis of the theoretical foundations, which inform surrogacy regulation. The chapter has analyzed the relevance of the feminist jurisprudence in the surrogacy discourse, alongside other legal theories of parenthood. Lastly, the chapter discusses the concept of surrogacy in a Human Rights' perspective.

#### 2.1 Conceptual Framework

##### 2.1.1 Artificial insemination and In vitro fertilization

**Artificial insemination.** This is a reproductive technology, which involves a non-coital conception process. The process involves several procedures whereby sperms are injected into the vagina of a woman.<sup>49</sup> Upon successful fertilization, the woman carries the pregnancy to term. This procedure is mostly used to impregnate a fertile wife of an infertile husband. A child born under this procedure is genetically related to one of the partners.

**In vitro fertilization.** This is a reproductive technology, which involves fertilization of the ovum in laboratory dish, after which the fertilized ovum (embryo) is inserted into the woman's womb

---

<sup>49</sup> Aneesh V. Pillai (n 24) p. 5.

through her vagina. The technology is also known as test-tube baby method. The procedure involves removing eggs from the woman's ovaries through laparoscopy, which, together with sperms are placed in a laboratory dish. This method is mostly utilized by childless couples who are unable to conceive in the conventional way.<sup>50</sup>

### **2.1.2 Gestational surrogacy, Genetic surrogacy and Surrogacy in the African Context**

These two reproductive technologies have occasioned the advent of two modern-day surrogacies: gestational surrogacy and genetic surrogacy.

**Gestational surrogacy-** It refers to a surrogacy that has been enabled by in-vitro fertilization procedure. It is also known as full surrogacy. It involves a process whereby the surrogate mother does not contribute her own egg but rather where an embryo is created with the gametes of the intending parents and the embryo is then transplanted or implanted into the surrogate mother's uterus.<sup>5152</sup>

**Genetic surrogacy-** It is also known as traditional surrogacy or partial surrogacy. In this type, the surrogate mother provides her own genetic material by using her own egg for conception.<sup>53</sup> Genetic surrogacy can further be divided into two formations, depending on whether the process has employed natural conception or conception through artificial insemination procedures.<sup>54</sup>

**Genetic surrogacy through artificial insemination.** In basic terms, this refers to a surrogacy that has been enabled by the artificial insemination procedure. It involves a process whereby a

---

<sup>50</sup> Ibid, p .5.

<sup>51</sup> Aneesh V. Pillai (n 24) p. 93.

<sup>52</sup> Amy Garrity, 'A comparative analysis of Surrogacy Law in the United States and Great Britain-A Proposed Model Statute for Louisiana' (2000) Vol. 60 (3) *Louisiana Law Review* p. 810. See also Abby Brandel, *ibid*, p. 492.

<sup>53</sup> Teresa Schon, Sabine Tagwerker and Magdalena Zabl 'International surrogacy arrangements and the establishment of legal parentage' (2015) p. 4. This was a paper submitted by the three presenters as 'Team Austria 2' at Vienna on 16<sup>th</sup> April 2015.

<sup>54</sup> Ibid.

surrogate mother contributes her own egg and the ‘intending father’ contributes his sperm, which are artificially inseminated into her uterus. As a result, the surrogate mother remains biologically related to the child but opts to give up the child to the recipient couple and relinquish all her rights to the child.<sup>55</sup>

**Genetic surrogacy through natural conception.** It refers to an arrangement whereby a husband of an infertile wife, through coital conception, gets children with another woman, with the understanding that the resulting child belongs to the infertile wife. The resulting child is genetically related to the father and the surrogate mother. Although some writers term genetic surrogacy as synonymous with the traditional surrogacy arrangements,<sup>56</sup> the difference between the two is significant and well recognized. While partial or genetic surrogacy involves a non-coital conception, traditional surrogacy arrangement involves coital conception.

Genetic surrogacy through natural conception is the oldest form of acquiring legal parenthood, and it exists under different forms. It can be traced in Biblical times when Sarah, Leah and Rachel, being unable to bear children, allowed their husbands to get them children through their handmaids.<sup>57</sup> Although most writers use the term ‘genetic surrogacy’ in general terms to describe the Biblical events, they do not distinguish its nature from the modern understanding of genetic surrogacy, which largely refers to surrogacy through artificial insemination.

**Genetic Surrogacy in the African Context.** Genetic surrogacy through natural conception has been, and is still being practiced by African societies, albeit slight modifications. Under the African traditional set up, woman-to-woman marriages to some extent possess the essential characteristics of surrogacy, whereby a woman bears children for a barren woman, who effectively based on the

---

<sup>55</sup> Abby Brandel (n 42) p.491. *See also* Joan Oburu (n 43) p.3.

<sup>56</sup> Amy Garrity (n 52) at the Comments.

<sup>57</sup> Abby Brandel (n 42) p. 488.

marriage acquires legal parenthood to the child. However, this African form of surrogacy materially falls short of the modern conceptualization of surrogacy with respect to relinquishment of parental rights at birth.<sup>58</sup> For instance, the woman under the woman-to-woman marriage does not relinquish her parental rights to the child, but rather, she shares the parental rights with the ‘husband.’

### **2.1.3 Commercial Surrogacy and Non-Commercial Surrogacy**

Surrogacy can further be classified into commercial and noncommercial surrogacy.

**Commercial Surrogacy**-This is a surrogacy arrangement in which the surrogate mother receives payment, which is beyond reasonable expenses associated with bearing a child. Here, the payment is a consideration for conceiving, gestating, bearing the child and subsequently relinquishing her parental rights to the child upon birth.<sup>59</sup> This type of surrogacy is prohibited in major jurisdictions like the United States and the Great Britain and it is a serious criminal offence under the laws of most Australian jurisdictions.<sup>60</sup>In Canada, commercial surrogacy is a criminal offence<sup>61</sup>

**Noncommercial surrogacy**- It is also known as altruistic surrogacy.<sup>62</sup> This is a surrogacy arrangement whereby the surrogate mother receives payment as pure compensation for the reasonable expenses associated with child bearing but she is not paid for her services or for relinquishing her parental rights to the child.<sup>63</sup> It has been observed that this type of surrogacy is

---

<sup>58</sup> Amy Garrity (n 52) p.810. In both cases of surrogacy, genetic and gestational, there is relinquishment of parental rights to the child.

<sup>59</sup> Ibid.

<sup>60</sup> Mary Keyes and Richard Chisholm, ‘Commercial Surrogacy-Some troubling family law issues’ p.2. *See also* Amy Garrity p. 810.

<sup>61</sup> Jackson Emily, ‘UK law and international commercial surrogacy: ‘the very antithesis of sensible’’ (2016) Vol. 4 (3) *Journal of Medical Law and Ethics* p. 197

<sup>62</sup> Anne Casparson, ‘Surrogacy and the best interest of the child’ (Master’s Thesis, Linkoping University 2014) p.1.

<sup>63</sup> Amy Garrity (n 52) p. 811.

readily accepted by societies and it is this type which any legislature would intend to sanction.<sup>64</sup>The court associated commercial surrogacy with illegality, crime and the element of degrading women and hence more objectionable. It has been submitted that non-commercial surrogacy is more acceptable because it reduces chances of commercial exploitation and it cuts off the number of women willing to be surrogates.<sup>65</sup>

## **2.2 THEORETICAL FOUNDATIONS OF SURROGACY REGULATION**

### **2.2.0 Feminist Jurisprudence and Surrogacy: Introduction**

Feminist jurisprudence is a philosophy of law based on the political, economic, and social equality of sexes. Feminists believe that history was written from a male point of view and does not reflect women's role in making history and structuring society. Its proponents challenge the belief that the biological make-up of men and women is so different that certain behavior can be attributed based on sex.<sup>66</sup> They have strived for women's freedom from their stereotypical motherhood role in the society to enable them take part in public spheres and pursue non-reproductive aspirations.<sup>67</sup>

Feminist jurisprudence has a long history. Although the feminist jurisprudence attained its most concrete form in the 1960s, its history dates back to the late 18<sup>th</sup> and early 19<sup>th</sup> centuries, when its most basic tenets were propounded by its most celebrated proponents; Mary Wollstonecraft, John Stuart Mill and Harriet Taylor Mill. Mary Wollstonecraft argued that many of the supposed differences between the sexes were either fabricated or exaggerated and therefore could not be used as the basis for differential rights and roles.<sup>68</sup> John Stuart Mill enhanced Mary's argument

---

<sup>64</sup> Ibid.

<sup>65</sup> Abby Brandel (n 42) pp. 493-4.

<sup>66</sup> Feminist Jurisprudence: An Overview Cornell Law School  
<[https://www.law.cornell.edu/wex/feminist\\_jurisprudence](https://www.law.cornell.edu/wex/feminist_jurisprudence)> Accessed on 10th October 2018.

<sup>67</sup> Sheela Saravanan, (2006) p. 80.

<sup>68</sup> Sek Suaali, 'Feminism Liberal' *Online Journal* p. 334

<<https://blogs.helsinki.fi/seksuaaliikka2011/files/2010/10/9-Liberal-Feminism.pdf>> p. 334.

pointing that the subjection of women stunted the moral development of women and denied them the self-fulfillment that comes only with the freedom to pursue one's own good.<sup>69</sup> Later, Harriet Taylor contributed to the theory by arguing that emancipating women by granting them the freedom to pursue one's own good would enable them participate more fully in the public life and would become the partners of men in productive industry.<sup>70</sup>

The feminist jurisprudence is not monolithic. Although feminists share common commitments between men and women, the theory has since evolved and mutated overtime, and it is now comprised of six different schools of thought, all of which have substantial differences in the conceptualization of pertinent issues touching on the jurisprudence. Three of the six schools of thought are major theories, well known and relatively well established; The Liberal Feminism, Radical Feminism and the Cultural Feminism, which started in the 1960s, the 1970s and 1982 respectively. The other three schools of thought are newly established; the Post Modern Feminism School, the Marxist School of feminism and Utilitarian school of feminism, started in early 1990's, late 1990's and 2004 respectively. This study has analyzed each of the six theories with a specific interest on the contribution to the surrogacy discourse.

---

<sup>69</sup> Ibid.

<sup>70</sup> Sek Suaali, (n 68) p. 334.

### 2.2.1 The Liberal Feminism

Liberal feminism<sup>71</sup> is the oldest branch of the feminist jurisprudence and its basic tenets were initially articulated by Mary and John before it acquired its most structured form in the 1960s. Liberal feminists challenge the assumption of male authority and seek to erase gender-based distinctions recognized by law by advocating for equal individual rights and liberties for women and men and downplaying sexual differences.<sup>72</sup> Although there is some disagreement among liberals about what freedom means,<sup>73</sup> liberal feminists agree on defending the equal rationality of the sexes by emphasizing the importance of structuring social, familial, and sexual roles in ways that promote women's autonomous self-fulfillment and emancipation.<sup>74</sup> John Stuart, one of its major proponents crowns it all through his argument for the emancipation of women. In his advocacy for women's rights, he expressed his strong conviction that the subordination of women, which deprives them of freedom, is wrong in itself, it a chief hindrance to human development,<sup>75</sup> and is an unjust violation of liberty.<sup>76</sup>

Liberal feminism permits commercial surrogacy on the basis that permitting surrogacy enhances individual autonomy, procreative liberty and women emancipation. Liberal feminists conceive surrogacy as a new forum for women to exercise individual autonomy to make important decisions on their body organs, and to enter into legal contracts for matters pertaining their bodies, just as

---

<sup>71</sup> It is also known as Traditional feminism, equity feminism or individual feminism.

<sup>72</sup> Feminist Jurisprudence (n 66).

<sup>73</sup> This disagreement has occasioned the development of two parallel forms of liberals; liberal feminism and classical-liberal feminism. Liberal feminism conceives of freedom as personal autonomy such that a person can live a of their choice while classical-liberal, which is also known as libertarian feminism conceives of freedom as freedom from coercive interference.

<sup>74</sup> Sek Suaali (n 68).

<sup>75</sup> Mill J. S 1984. The Subjection of Women. In: The Collected Works of John Stuart Mill, Vol. 21: Essays on Equality, Law and Education. Ed. John M. Robson (Toronto: University of Toronto Press) p. 261.

<sup>76</sup> Mariana Szapuova, p. 182. No doubt this essay on women's subjection is the most persuasive piece of liberal feminist thinking.

men do during sperm donation and hence equalizing the reproductive opportunities for the two sexes.<sup>77</sup> The classical-liberal feminists advocate for women's right to freedom in reproductive matters, which should include the right to buy and sell bodily reproductive services and by extension the right to engage in surrogate motherhood.<sup>78</sup> The liberals position on surrogacy can be summarized by Sheela's argument that the state should not have the right to interfere into a woman's will to participate in surrogacy.<sup>79</sup>

### **2.2.2 The Radical Feminism**

Radical feminism is the second oldest branch of feminist jurisprudence, having started in early 1970s, with its major proponents being Professor Catharine MacKinnon and Christine Littleton.<sup>80</sup> Its basic tenet is their assertion that men as a class have dominated women as a class, creating gender inequality, coupled by their understanding of gender as a question of power. They agree that this male domination and sexual subordination of men over women has been occasioned by the construction given to the essential differences between the two sexes. They argue that the construction these cultural, legal, economic and social differences have contributed to women's inequality and has placed women in socially disadvantaged position.<sup>81</sup> In their pursuit to cure this rather unwelcome scenario, radical feminists advocate for the desertion of traditional approaches that take masculinity as their reference point.<sup>82</sup>

---

<sup>77</sup> Ibid.

<sup>78</sup> Stanford Encyclopedia of Philosophy.

<sup>79</sup> Sheela Saravanan (n 67) p. 80.

<sup>80</sup> Sonali Kusum, 'Commercial Surrogacy and Feminist Perspectives' (2013) Vol. 1 *Karnataka Law Journal*. <[https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#\\_ftnref18](https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#_ftnref18)> Accessed on 10<sup>th</sup> October 2018.

<sup>81</sup> Ibid.

<sup>82</sup> Feminist Jurisprudence (n 66).



The radical feminists take a sharp contrast with the liberal feminist, particularly on the issue of surrogacy. They do not support surrogacy on the ground that surrogacy agreements are dehumanizing, it is an affront to human dignity and it is a grave violation of some fundamental human rights. They argue that it commodifies a woman's body by reduces a woman's reproductive labour or pregnancy to a form of alienated labour like any other market labour in the market available for hire.<sup>83</sup> Some of the fundamental rights violated are the denial of reproduction rights, especially on the limitation of the reproductive right to abortion or right to medical termination of pregnancy.<sup>84</sup> In addition, they argue that surrogacy is akin to prostitution,<sup>85</sup> it is exploitative and coercive by nature so much so that no woman can rationally choose it.<sup>86</sup> In a summary, they place more premiums on the wording of the surrogacy agreement, which they are apprehensive that such contracts will most likely be drafted to favour the intending father, by imposing restricting and binding obligations on the surrogate mother.

### **2.2.3 The Cultural Feminism**

The cultural feminism started in 1982, and its major proponent is Professor Carol Gilligan. The theory focuses on the differences between men and women and celebrates those differences. This branch advocates for equal recognition to women's moral voice of caring and communal values.<sup>87</sup>

Like the Radical feminists, this school opposes the practice of commercial surrogacy due to the unique nature of obligations, which surrogacy contracts impose on surrogate mothers. They

---

<sup>83</sup> Colleen Sheppard, 'Feminist Pragmatism in the Work of Justice Bertha Wilson' (2008) Vol 41 (6) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* p. 84.

<sup>84</sup> Sonali Kusum (n 80).

<sup>85</sup> Anton Van Niekerk and Liezl van Zyl, 'The ethics of surrogacy: Women's reproductive labour' (1995) Vol. 21 *Journal of medical ethics* pp. 345-349.

<sup>86</sup> Shodhganga Repository p. 232.  
<[http://shodhganga.inflibnet.ac.in/bitstream/10603/160789/14/09\\_chapter%206.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/160789/14/09_chapter%206.pdf)> Accessed on 10<sup>th</sup> October 2018.

<sup>87</sup> Feminist Jurisprudence (66).

characterize the contractual terms as being biased to favour the intending father, who, they assume that he has the capacity to pay for the services. Against this background, they argue that surrogacy makes pregnancy entirely male, due to the new roles and the active role played by intending father. Like the radical feminists, they place high premium on the kinds of restrictions, which the surrogacy arrangement might impose on the surrogate mother. They too, are apprehensive that the intending father might ensure forfeiture of fundamental reproductive rights like the right to abort. From their perspective, they see surrogacy as a mutative nature of patriarchy, which is encroaching into the women's reproductive and private sphere.<sup>88</sup>

#### **2.2.4 Post Modern Feminism**

This is a relatively new but very convincing school of thought, which started in the early 1990's with its chief proponent being Margaret Jane Radin. This school disregards the previous theories of feminism by terming them very abstract and instead advocates for a more pragmatic approach to feminism. The school seeks practical solutions to concrete situations by embracing diversity, multiple truths, multiple realities and multiple roles as part of its focus.<sup>89</sup> It rejects the idea that there is universal essential woman or female experience that can serve as a measure of society's mistreatment of women. Based on this assumption, the school argues that there are different categories of women all with different experiences and therefore the school seeks to embrace the realities of all categories of women by adopting multiple perspectives in the construction of women realities.<sup>90</sup>

---

<sup>88</sup> Katherine Baker, 'Property Rules Meets Feminist Needs: Respecting Autonomy by Valuing Connection' (1998) Vol. 59 *Ohio Law Journal* p. 227.

<sup>89</sup> Margaret Jane Radin, 'The Pragmatist and the Feminist' (1990) Vol. 63 *Southern California Law Review* pp. 1699-1726.

<sup>90</sup> Shodhganga (n 86) p. 233.

The Post Modern Feminism has the most robust relevance in the Surrogacy discourse, thanks to its broader conceptualization of a woman. The theory is alive to the legal, social and economic implications of regulating surrogacy and the theory seeks to strike a balance on how such regulation should be done. While on the one hand the theorists acknowledge that commodification of women's reproductive and sexual capacities risks accentuating exploitation and oppression, they are equally acknowledge that legal prohibitions on commodification threaten to undermine women's autonomy.<sup>91</sup> Faced with this dichotomy,<sup>92</sup> feminist pragmatists recognize that choosing either of the two, as it is maintained by the original three theories,<sup>93</sup> might not be the optimal public policy and an outcome strictly along the three ideal dimensions may leave individuals without a remedy.<sup>94</sup>

The Post Modern Feminism offers a substantial contribution to the surrogacy discourse, as it illuminates the surrogacy controversy by balancing the two competing perspectives on regulating surrogacy simultaneously. It offers plural-motherhoods' perspective which introduces heterogeneity in the definition of motherhood by incorporating both the intending mothers' and the surrogate mothers' perspectives on motherhood.<sup>95</sup> This theory advocates for surrogacy since it offers pluralistic choice of means to motherhood to women, and its broader perspective on motherhood has expanded the perceptions of motherhood to include intended motherhood and surrogate motherhood.<sup>96</sup>

---

<sup>91</sup> Colleen Sheppard (n 83) p. 84.

<sup>92</sup> The dichotomous policy choice of either allowing contracts that commodify women's bodies or prohibiting such contracts.

<sup>93</sup> Liberal, Cultural and Radical schools of thought.

<sup>94</sup> Colleen Sheppard (n 83) p. 85.

<sup>95</sup> Laura R. Woliver (n 18) pp. 185-193.

<sup>96</sup> Sonali Kusum (n 80).

### **2.2.5 Marxist School of Feminism**

The Marxist feminism offers a capitalistic perspective on surrogacy and a qualified approval for surrogacy practice. Through the lens of a capitalist, Marxist feminists, led by the chief proponent Pateman,<sup>97</sup> agree that surrogacy agreements meet all the essential features of a commercial contract. For instance, they view surrogacy as an alienated labour available in market as wage contract for a price backed by a commercial agreement. Alternatively, they view it as a wage contract for service, based on the fundamental assumption that the surrogate baby can be treated as separable from her own body and herself. Under the latter conceptualization, they conceive a surrogacy agreement as a wage contract, the end product as the surrogate child, and the mode of production as the bodily reproductive service. Consequently, they argue that surrogacy should be permitted like any other wage contract labour.<sup>98</sup>

### **2.2.6 Utilitarian School of Feminism**

Utilitarian feminists, led by Laura Purdy,<sup>99</sup> incorporate a utilitarian approach to the surrogacy discourse, by analyzing pertinent social and ethical issues on surrogacy from a utilitarian perspective. Driven by the underlying objective to achieve maximum happiness for the greatest number of people, utilitarian feminists place high premium on the happiness gained by intending infertile mothers and intending mothers suffering from biological defect who cannot give birth themselves, on the basis of which it attains legitimacy. Concerned about the exploitative nature of surrogacy agreements, to the detriment of the Surrogate mothers, they advocate for strict regulation

---

<sup>97</sup> Carole Pateman, 'Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts' (2002) Vol. 10 (1) *The Journal of Political Philosophy* pp. 20-53.

<sup>98</sup> Shodhganga Repository (n 86) p. 233.

<sup>99</sup> Thomas Sobirk Petersen, 'A Woman's Choice? On Women, Assisted Reproduction and Social Coercion' (2004) Vol. 7 (1) *Ethical Theory and Moral Practice* pp. 81-90.

of surrogacy with appropriate regulations, which give special consideration to the health of the surrogate mother. In pursuit of its utilitarian goals, this brand maintains that surrogacy should be regulated but not prohibited.

### **2.2.7 Liberal Feminism versus Radical Feminism**

Although the fundamental feminist ideologies of liberty, equality and justice remain intact, the developments in reproductive technologies and surrogacy practice by extension, has challenged these fundamental ideologies. The evergreen challenge features the ‘liberty’ ideology, which incorporates freedom of choice and individual autonomy. The extent of the challenge posed to this ideology stands conspicuously throughout confrontations between the radical feminism and the liberal feminism. While as the liberals view surrogacy as a tool, which can liberate women by separating the role of reproduction from rearing, the radicals do not see any liberation in surrogacy since women have to participate exactly in the same roles, reproduction.<sup>100</sup> In addition, while as the liberals view surrogacy as procreative liberty and a matter for individual choice<sup>101</sup>, which the state should not interfere with, the radicals, view it as a violation of a person’s dignity and integrity.<sup>102</sup>

### **2.2.8 The Relevance of the Feminist Jurisprudence**

Out of the six schools of thought, three of them are of significance to this study; The Liberal feminism, the Post Modern Feminism and the Utilitarian School of feminism. Despite their difference of opinion, the three have a common objective; they advocate for a regulatory mechanism for surrogacy practice whose main agenda is to safeguard the interest of women,

---

<sup>100</sup> Sheela Saravana (n 67) p. 11.

<sup>101</sup> Ibid, p. 80.

<sup>102</sup> Ibid, p. 12.

guarantee optimal welfare and minimize the exploitative nature of surrogacy to the minimum. The divergent perspectives of these three schools is of great utility here, as it informs the study of the various pertinent issues which have to be considered when establishing a legal and policy regulatory framework on surrogacy.

## **2.3 Theories of Legal Parenthood**

Legal commentators have proposed four theories of legal parenthood: A genetic Model of legal parenthood, an intent model of legal parenthood, a property theory of custody and a labor theory of legal parenthood.<sup>103</sup> The first three theories are distinct as they advocate for different rights for different parties to the surrogacy arrangement. However, the fourth theory, which is more recent, adopts an inclusive approach by taking into consideration the various interests of the different parties to a surrogacy arrangement. The researcher will examine the four theories for practicability, internal consistency and their ability to make a case for legislating on surrogacy.

### **2.3.1 The Genetic Model of Legal Parenthood**

This model proclaims that individuals should have a right to their genetic offspring. It places more premium on the genetic composition of the child as opposed to other factors like marital status of its parents. The proponents of this theory, led by Kermit Roosevelt, make the fundamental assumption that people have property interest in their genes and therefore parents should have inherent custodial rights over their biological children by dint of their rights in their reproductive materials.<sup>104</sup> Women and men have property rights in their eggs and sperm respectively and hence legal parenthood should be awarded to whoever held the rights in the raw materials before

---

<sup>103</sup> Shoshana Gillers, 'A Labor Theory of Legal Parenthood' (2000) Vol. 110 *The Yale Law Journal* p. 699.

<sup>104</sup> Kermit Roosevelt, 'The Newest Property: Reproductive Technologies and the Concept of Parenthood' (1998) Vol. 39 *Santa Clara Law Review* p. 80.

gestation.<sup>105</sup> The theory also makes a case for legal parenthood on the best interest of the child, where they argue that children are better off with their genetic parents.<sup>106</sup>

The relevance of this theory in the surrogacy discussion cannot be overemphasized. The theory has been highly criticized for overlooking gestation and childbirth, both of which are crucial steps that occur between the production of reproduction materials and the arrival of a newborn.<sup>107</sup> It places a high premium on the genetic contribution, while failing to account for the gestation labor and the eventual childbirth contributed by the surrogate mother, especially in gestational surrogacies, where the surrogate mother does not share genetic makeup with the child. Further, it has been argued that it is not always automatic that the owners of the raw materials are the same owners of the finished product. However, the model is a crucial tool of advocating for the rights of a genetic surrogate mother, who has no marital relationship with the contracting-genetic father.

### **2.3.2 The Intent Model of Legal Parenthood**

The model was co-propounded by Hill and Shultz, and it is also known as contract- based or intent-based theory. The model is based on the premise that parties to a contract should honor contractual agreements. It places more premiums on the intention of the parties, who initiated the reproduction process. According to the model, the intention of the contracting parties should be a sufficient factor in deciding parenthood meaning that legal parenthood should go to the contracting parents also known as the intending parents.<sup>108</sup> Intent theorists advocate that legal parenthood should be

---

<sup>105</sup> Carla Spivack, ‘The Law of Surrogate Motherhood in the United States’ (2010) Vol. 58 *The American Journal of Comparative Law* p. 105.

<sup>106</sup> *Ibid* p. 106.

<sup>107</sup> Shoshana Gillers (n 103) p. 701.

<sup>108</sup> Carla Spivack (n 105) p. 103.

awarded to those who originally intended to bring the child into the world, particularly, those who have organized the reproduction process.<sup>109</sup>

This model has relevance in the surrogacy practice, in as much as it advocates that parties to a surrogacy agreement should be encouraged to stick to the agreement. This legal model advances the researcher's argument that courts and administrative state agencies should respect the wishes of the parties, especially where a surrogate mother has transferred her entitlements and parental rights to a developing fetus. Largely, this model influenced the Kenyan courts in the *AMN*<sup>110</sup> and *JLN*<sup>111</sup> cases, where they recognized the surrogacy contractual agreements and enforced them under the classical law of contract.

### **2.3.3 The Property Model of Legal Parenthood**

The property model of legal parenthood,<sup>112</sup> which was propounded by Baker, argues that one can only achieve legal parenthood by acquiring property-like rights in a child.<sup>113</sup> She argues that parents acquire property rights in their relationships with their children based on their emotional investment in child rearing and custody is the reward for the emotional investment.<sup>114</sup> Taking these arguments to surrogacy scenarios, the theory argues that the custody of the newborn child, born under a surrogacy arrangement, should be awarded to the gestating mother, based on her unique physical and greater emotional connection to the child,<sup>115</sup> and who alone has complete autonomy

---

<sup>109</sup> Shoshana Gillers (n 103) p. 702.

<sup>110</sup> *AMN* (n 29).

<sup>111</sup> *JLN* (n 28).

<sup>112</sup> It is also known as a property theory or the labour theory of custody.

<sup>113</sup> Shoshana Gillers (n 103) p. 703. The theory serves as a complement to the intent-based theory.

<sup>114</sup> Katherine Baker, 'Property Rules Meets Feminist Needs: Respecting Autonomy by Valuing Connection' (1998) Vol. 59 *Ohio Law Journal* pp. 1580-81.

<sup>115</sup> *Ibid*, p. 1586.



in making decisions for the child, as opposed to the biological father.<sup>116</sup> Further, acquiring custodial interest by any other person must be sanctioned by its mother through either of the two main routes of registering an interest in a child; adoption or marriage to the mother.<sup>117</sup>

The theory places more premium on emotional investment of child-bearing and it has no regard for both monetary and genetic investment thereby neglecting the efforts of other crucial participants in the childbearing process, especially monetary and genetic investors.<sup>118</sup> The theory has marginal relevance in the surrogacy context. First, it focuses more on subsequent custody cases than on the initial custody of a newborn. Largely, it is primarily concerned with acquiring property and custodian interests on a newborn and it does not address on acquiring such interests on the unborn fetus. These limitations notwithstanding, the theory recognizes the inevitable emotional bond coupled by the hormonal aspect, which is common in both genetic and gestational surrogacies. To this end, the law should recognize the surrogate mother's emotional investment and legislate on how these rights should be addressed.

#### **2.3.4 A Labor Theory of Legal Parenthood**

The Labour theory of legal parenthood advances a more robust forum for addressing the pertinent issues arising in the surrogacy practice than the previous three theories of legal parenthood. Its proponents, led by Shoshana Gillers, advance a legal theory, which incorporates the main arguments propounded by the three earlier theories as well as addressing their shortfalls. For

---

<sup>116</sup> According to Baker, the biological father has not done emotional investment on the child which could crystalize to recognizable property interest and consequently he has not acquired custodial interest.

<sup>117</sup> Katherine Baker (n 114) p. 1586.

<sup>118</sup> Shoshana Gillers (n 103) p. 705.

instance, the theory honors property rights of the genetic parents, it acknowledges the labor of childbearing and it addresses the intentions of the parties as articulated in surrogacy agreements.<sup>119</sup>

Shoshana bases her argument on the Lockean theory, which states that an individual's right to an object flows from the productive labor, which the individual has put into the object. Viewing gestation as labor intensive, Shoshana argues that legal parenthood and the custody of the child should be awarded to the gestational mother, being the person who has labored for it.<sup>120</sup> Further, she also employs the Lockean theory to describe how intending parents can finally own the products of the surrogate mother's labor. She bases this latter argument of capitalist property principles, which assume that labor can be sold and that rights to the developed product accrue to those who hire laborers.<sup>121</sup> This latter argument is very instrumental in crystalizing the rights of the intending parents, who hire the surrogate's services for a fee and the supply her with the sperm and sometimes the egg.

Although her analysis of the capitalist property principles sits properly in the context of gestational surrogacy, its applicability is less certain in genetic surrogacy where the surrogate mother is also a producer of the reproductive raw materials. Nonetheless, the Labor theory has valuable influence in this research. Due to its robust approach and its ability to incorporate different perspectives, the researcher has utilized this theory to advocate for a legislative framework, which reflects the diverse and sometimes conflicting interests of the parties to the surrogacy arrangement.

---

<sup>119</sup> Shoshana Gillers (n 103) p. 706.

<sup>120</sup> Ibid p. 707.

<sup>121</sup> Ibid p. 710.

## 2.4 Surrogacy: Human Rights Perspective

Conceptualization of surrogacy as a human right has encountered several important legal questions. Three issues are key; whether the state can legally interfere with its citizen's private procreative choices, whether surrogacy facilitates women and the poor and thus against public policy, whether surrogacy affects legal paternity and whether surrogacy agreements are enforceable in whole or in part.<sup>122</sup>

Arguments for surrogacy regulation have found favour with the constitutional rights to privacy, fundamental liberties and human dignity. Some scholars prefer basing a case for surrogacy based on the human dignity, upon acknowledging the tension that attaches to advocating for surrogacy on liberal rights, freedom of contract and personal choice.<sup>123</sup> Several writers have legitimized surrogacy based on constitutional reproductive rights. Rachel,<sup>124</sup> for instance, argues that intending parents have a right to form a family and a surrogate mother has a right to bear a child and hence the law should permit surrogacy as an expression of these fundamental rights.<sup>125</sup>

Surrogacy can also be viewed as an expression of women's right to individual autonomy and the epitome of Human emancipation, both of which crystalize the human right to development. Several legal writers have advocated the surrogate's reproductive freedom and autonomy on the premises of her right to 'bodily self-determination.'<sup>126</sup> They argue that surrogacy should be perceived as an

---

<sup>122</sup> Anita Allen, 'Surrogacy, Slavery, and the Ownership of Life' (1990) Vol. 13 *Harvard Journal of Law & Public Policy* p.139.

<sup>123</sup> Kate Galloway, 'Surrogacy and dignity: rights and relationships' (2016) *Bond University, Law Faculty Publications* p. 15.

<sup>124</sup> Rachel Kunde's ideas of surrogacy as a human rights are traceable from her article, 'Australian Altruistic Surrogacy: Still a way to go' (2015) Vol 3. *Griffith Journal of Law and Human Dignity*. In this article, she narrates her experience as an altruistic surrogate with two Australian couples, who she helped get children.

<sup>125</sup> Kate Galloway (n 123) pp. 35-37.

<sup>126</sup> *Ibid* p. 39. See also Rosalind Pollack Petchesky, 'Reproductive Freedom: Beyond "A Woman's Right to Choose"' (1980) Vol. 5 *Signs* p. 661, 663;

expression of reproductive freedom, just as an individual has the right to make choices on the individual's procreative capacity in terms of choosing the sexual partner, sterilization and access to contraceptives among others. In addition, liberal feminists have associated surrogacy with human emancipation, especially to the women. They argue that surrogacy liberates them from the long-held traditional roles, which limit childbirth to marriage.<sup>127</sup>

## **2.5 Surrogacy as Reflected under International Human Rights instruments**

To some extent, the discourse on surrogacy has been founded on the UN Charter Based system. Although International human rights instruments lack an explicit provision for the right to reproduction and the right to engage in surrogacy, this right can be founded on the broad interpretation of the wording of the instruments. The recognition of surrogacy at the international level can be deduced from two different rights provided for under the human rights instruments; the right to form a family and the right to benefit from scientific advancement.<sup>128</sup>

The UN Charter provides that all couples and individuals have a right to attain the highest standard of sexual and reproductive health.<sup>129</sup> Moreover, the UDHR provides for a right to establish a family,<sup>130</sup> and a right to enjoy and take advantage of scientific developments.<sup>131</sup> Legal commentators and scholars believe that this latter right to is the most concrete human right on which human rights on scientific technologies might be based.<sup>132</sup> Even though both the ICCPR and the ICESR lack express provisions for surrogacy-related rights, such rights can nevertheless

---

<sup>127</sup> Anita Allen (n 122) p. 148.

<sup>128</sup> Aneesh (n 24) p. 34.

<sup>129</sup> Office of the United Nations High Commissioner for Human Rights, *Reproductive Rights are Human Rights: A Handbook for International Human Rights Institutions* (2014) <<http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>> Accessed on 27<sup>th</sup> June 2018. This right includes the right to make decisions concerning reproduction free of discrimination, coercion and violence.

<sup>130</sup> UDHR, Article 16.

<sup>131</sup> UDHR, Article 27.

<sup>132</sup> Aneesh (n 24) p. 36.

be implied on the ICCPR, especially on the Covenant's right to form a family.<sup>133</sup> On the other hand, such rights can be implied on the ICESR, particularly on the Covenant's right to utilize and take advantage of scientific advancements.<sup>134</sup>

## **2.6 Conclusion**

This chapter has offered a comprehensive analysis of the legal theories on which the research finds its case for surrogacy regulation in Kenya. The study borrows much from the liberal, the postmodern, Marxist feminists and utilitarian feminism, all of which approve the practice for surrogacy though from different perspectives. Taken as a whole, these four feminist theories agree that surrogacy is a tool that advances women self-fulfillment, autonomy and women emancipation and its practice is in conformity with the fundamental feminist ideologies of liberty, equality and justice. In addition to the feminist jurisprudence, the other legal theories of legal parenthood have a sway on this work, particularly the labour theory of legal parenthood, which incorporates a robust perspective, and an all-round recognition of all the pertinent issues and conflicting interest inherent on surrogacy practice. Lastly, in as much as surrogacy has been widely accepted as a human right in several jurisdictions, the UN Charter-based system has not explicitly recognized this right and its can only arrived through implied interpretation.

---

<sup>133</sup> ICCPR Article 23.

<sup>134</sup> ICESR Article 15.

## CHAPTER THREE

### AN ANALYSIS OF THE LEGAL FRAMEWORK ON SURROGACY PRACTICE AND ARRANGEMENTS IN KENYA

#### 3.0 Introduction

This chapter analyses the extent to which the Kenyan legal, institutional and policy framework appreciates and recognizes surrogacy practice. The discussion features the Constitution of Kenya 2010, international conventions ratified by Kenya, the Children Act, the Birth and Death Registration Act, other relevant legislative enactments. In addition, the researcher has analyzed the relevant case law, and particularly the jurisprudence emanating from the Children's Court and the High Court in the *WKN* case, the *JLN* case and the *AMN* case. Further, it analyses the efficacy of self-regulation as the recognized model of regulation for surrogacy and with particular concern on its ability to curb the emerging and rampant illegal surrogacies.

#### 3.1 The Legal framework on Surrogacy practice in Kenya

##### 3.1.1 The Constitution of Kenya

To a great extent, the constitution of Kenya has provided an adequate framework for the protection and promotion of surrogacy arrangements. The constitutional foundation for the practice of surrogacy can be construed under three constitutional rights: the constitutional right to form a family,<sup>135</sup> the constitutional right to reproductive health care<sup>136</sup> and the constitutional principle of the best interest of the child.<sup>137</sup> The first and the second rights are largely owed to the intending parents, while the third right is largely owed to the child born out of surrogacy. These three rights

---

<sup>135</sup> Constitution of Kenya, Article 53.

<sup>136</sup> Constitution of Kenya, Article 43 (1) (a).

<sup>137</sup> Constitution of Kenya, Article 53 (2).

provide the constitutional basis upon which other legislative, legal, institutional and policy frameworks on surrogacy should be based.

The right to family has the greatest appeal and sits more squarely as a paramount tool for championing surrogacy arrangements. What is more, this right acquires compelling sanction when brought to the African context, where a child is a necessary element of the African family. It has been argued that children are an important aspect in most indigenous African communities. Most African societies define a family as that which constitutes both adults and children, such that a childless family is considered as incomplete.<sup>138</sup> Notwithstanding the fact that the constitution does not expressly provide for surrogacy, the Kenyan childless couples and intending parents have a right to use assisted reproductive technology to found a ‘complete’ family, in the African sense.

The intending parents have a constitutional right to access and utilize assisted reproductive technologies like the IVF. The Constitution provides that every person has the right to the highest attainable standard of health, which includes the right to health care services, including reproductive health care.<sup>139</sup> For the intending parents, the right is closely intertwined with the duty of the state to recognize and protect the family as the natural and fundamental unit of the society.<sup>140</sup> The scope of the duty is broad enough and such recognition and protection can adequately be achieved through an elaborate legal, institutional and policy framework on surrogacy.

Equally, a child born pursuant to a surrogacy arrangement has a right to a family. Just as the commissioning couple has a constitutional right to have a family, the resultant child has a right to have a stable family system through which they can easily ascertain their origin and one free from

---

<sup>138</sup> Robai Ayieta (n 25) p. 12.

<sup>139</sup> Constitution of Kenya, Article 43 (1) (a).

<sup>140</sup> Constitution of Kenya, Article 45.

contention. Some of the fundamental rights and freedoms enshrined in the Constitution are the right to acquire a definite nationality at birth, the right to be protected from inhuman treatment and punishment and the right to parental care and protection.<sup>141</sup> Therefore, the state should protect these rights by legislative enactments, through which it will stipulate finer and sophisticated details on how the surrogate child must achieve the full enjoyment of the child's right to family.

'The Best interest of the Child' principle is the most celebrated constitutional right of a child and it is very relevant in the surrogacy discourse. This constitutional principle provides that the best interests of the child must guide decisions on any matters touching on the life of a child. In circumstances where there are various conflicting interests, the child's best interests take paramountcy.<sup>142</sup> This right has also been provided for under the Children Act. The right imposes a duty on the government, the courts, the parliament, state agencies and private citizens to place high premium on the best interests of a child, whenever formulating, interpreting or enforcing the law and whenever their actions concern a child.<sup>143</sup> Based on this framework, a child born through surrogacy has the right to have his rights and welfare safeguarded and promoted.<sup>144</sup>

In addition, the Constitution provides for the right to dignity and the right to privacy. The duo is of great significance within the surrogacy discourse, particularly when addressing pertinent questions on the approach and the treatment of surrogacy arrangements and disputes. Every person has the.<sup>145</sup> This constitutional basis envisages handling such arrangements in a manner conforming to the unquestionable and inalienable right to human dignity and privacy. This right enjoins the government, the public administrative bodies, non-state actors and private individuals to appreciate

---

<sup>141</sup> Constitution of Kenya, Article 53 (1) (a)-(e).

<sup>142</sup> Constitution of Kenya, Article 53 (2).

<sup>143</sup> Children Act, s. 4 (2).

<sup>144</sup> Children Act, s. 4 (3) (a).

<sup>145</sup> Constitution of Kenya, Article 28 and 35.



the intricate nature of the surrogacy arrangements and the varied conceptions on the practice. The right to human dignity in the surrogacy context has been upheld by the High Court in JLN where a hospital unlawfully took away surrogate children from their parents.<sup>146</sup>

The relevance of this constitutional right to dignity and privacy in surrogacy discourses is well appreciated and acknowledged. The scope of the right is wide as it covers the right of the child, the right of the surrogate mother or parent(s) and that of the intending parents. In fact, many surrogacy activists have based their arguments on this particular right. Kate Galloway has used human dignity as a basis for advocating for the interests of birth mother.<sup>147</sup> In addition, it has been argued that a child's human dignity forms a fundamental tenet of surrogacy regulation and it must be protected under the concept of the best interests of the child.<sup>148</sup> As such, the Kenyan courts, and other quasi-judicial bodies are mandated to be alive to the question of 'human dignity' as they adjudicate surrogacy arrangements.

### **3.1.2 International Human rights instruments**

The Kenya legal framework on surrogacy also includes the international human rights instruments, to which Kenya is a signatory. The two most relevant instruments are the ACHPR<sup>149</sup> and the ICESCR. The ICESCR prohibit child discrimination on grounds of parentage or other conditions.<sup>150</sup> The ACHPR's right to self-determination offers the most solid and commendable basis for advocating, protection and promotion of surrogacy arrangements. The right permits

---

<sup>146</sup> JLN (n 28) para. 37.

<sup>147</sup> Kate Galloway (n 123) p. 26.

<sup>148</sup> Ibid.

<sup>149</sup> African Commission on Human and Peoples' Rights, Ratification Table: ACHPR. Available at <<http://www.achpr.org/instruments/achpr/ratification>> Accessed on 5<sup>th</sup> August 2018. Kenya ratified this Charter on 23 January 1992.

<sup>150</sup> ICESCR, Article 10 (3).

people exercise their free will in pursuit of their political development.<sup>151</sup> Similarly, acquiring legal parenthood pursuant to a surrogacy arrangement should be conceived as a form of any other social determinant, the choice of which should be at people's liberty.<sup>152</sup>

Specific International Human rights instruments have provided for the rights of a child, and by extension to the rights of children born pursuant to a surrogacy arrangement. The UN Convention on the Rights of the Child confers a right; to have uncontested identify, to get a legally registered name and to have family ties and relations free of illegitimate interference.<sup>153</sup> The ACRWC provides for the child's right to protection of privacy. It prohibits any unauthorized interference with the child's privacy or the privacy of its family, together with any action made to tarnish its repute and honour.<sup>154</sup> Although these instruments have no specific reference to surrogacy, they can be interpreted to impose a duty on persons to accord appropriate treatment to children born out of surrogacy.

### **3.1.3 The Children Act**

The Children Act, being the principal Act on legal matters pertaining children, does not provide for surrogacy, neither expressly nor by implication. The Act provides for everything except the specific protection of children born out of surrogacy. It provides for parental responsibility,<sup>155</sup> child adoption,<sup>156</sup> child custody and child maintenance,<sup>157</sup> childcare and child protection.<sup>158</sup> In the

---

<sup>151</sup> Article 20 (1).

<sup>152</sup> Joan Oburu (n 43) p. 41.

<sup>153</sup> Eva Palmqvist, 'Children's Rights in Kenya- an Analysis on the CRC Reports' (2006, Save the Children Sweden) p. 39. Article 7 and 8. Kenya ratified the Convention on 30<sup>th</sup> July 1990.

<sup>154</sup> African Charter on the Rights and Welfare of the Child, Article 20. Also available at <[http://www.achpr.org/files/instruments/child/achpr\\_instr\\_charterchild\\_eng.pdf](http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf)> Accessed on 23<sup>rd</sup> August 2018. Kenya ratified the Charter on July 2000.

<sup>155</sup> Children Act, PART III, ss. 23-29.

<sup>156</sup> Children Act, PART XII.

<sup>157</sup> Children Act, ss. 81-89.

<sup>158</sup> Children Act, PART X, ss. 118-129.

definition of a 'child,' the Act does not include children born pursuant to a surrogacy arrangement. Further, the Act limits the scope of the definition of the term 'parent' to 'the mother or the father,' the person entitled to the child's custody and the person liable to the child's maintenance. From the wording of the Act, the Act did not contemplate surrogacy.

The Children Act does not provide surrogacy arrangements as a way of acquiring legal parentage. Instead, the Act provides for three other ways. One of them is by the marriage of the parents, either at or after the birth of the child. In addition, one of the parties may acquire legal parentage by entering into a parental responsibility agreement. Lastly, a person can acquire legal parentage through the adoption process. As such, the Act does not provide for the different scenarios by which other parties can acquire legal parenthood, especially through assisted reproduction under the modern technological advancements, particularly IVF and ART.

Thus, the Act leaves out scenarios where the commissioning 'parents' do not share genetic makeup with the child. Particular interest has been drawn on the Act's definition of a parent as the 'mother or father of a child.' A conventional interpretation of this definition conceives a mother to be the woman who bore the child, and who is naturally the genetic mother of the child. However, this orthodox interpretation can no longer hold in the surrogacy discourse, where the situation is very distinct from the traditional setup since the commissioning mother does not carry the pregnancy and she need not be genetically related to the child.<sup>159</sup> In addition, going by this orthodox interpretation, a Kenyan commissioning couple, which seeks surrogacy services, but does not donate the egg and the sperm, cannot acquire parental status over the child and as such the couple is required to invoke other procedures to acquire legal parenthood to the child.<sup>160</sup>

---

<sup>159</sup> Muthomi (n 41) p. 5.

<sup>160</sup> Ibid.

### 3.1.4 The Birth and Death Registration Act

The Kenyan legislative framework makes a fundamental assumption that the legal mother of the child is the woman who carries the pregnancy and bears the child. The Births and Deaths Registration Act's conceptualization of birth leaves no room for assisted reproductive technologies. It defines 'birth' as the issuing forth of any child from its mother after the expiration of the twenty-eighth week of pregnancy.<sup>161</sup> Further, a birth notification requires the particulars of the woman who has physically bore the child.<sup>162</sup> Under the Children Act, parental responsibility attaches to the mother at the time of the child's birth.<sup>163</sup> In cases where the parents are not married, the mother of the child has parental responsibility at the first instance.<sup>164</sup>

However, this assumption is now more questionable than before and it has lost grip with the advent of the new technological advancements. Consequently, the assumption can no longer survive its criticism within the surrogacy discourses. The new technological advancements do not place high premium on the physical act of child delivery but rather on the contractual agreements made by the parties. The surrogate mother gives birth to the child and the commissioning parents have nothing to do with the physical act of giving birth. As such, the Acts have lost touch with the reality and the felt necessities of the contemporary Kenyan society, which has now embraced surrogacy.

---

<sup>161</sup> Births and Deaths Registration Act, 1928 s 2. The Court in JLN gave a similar interpretation to Section 10 of the Act, where it held that the mother referred to in the Act is the birth mother. See JLN, para. 24.

<sup>162</sup> The Births and Deaths Registration Rules 1966, Form No. 1, Schedule.

<sup>163</sup> Children Act, s 24 (1).

<sup>164</sup> Children Act, s 24 (3) (a).

### **3.1.5 A discussion of the Children Act, the Birth and Death Registration Act and the Assisted Reproduction Bill**

The position of these two statutes on surrogacy can be justified, considering the times at which the Acts were enacted. The Acts were enacted way before the advent of assisted reproductive technologies in Kenya. The Births and Deaths Registration Act was enacted in 1928, long before independence,<sup>165</sup> and its last amendment was done, in 1990, 28 years ago.<sup>166</sup> The Children Act was enacted in 2001, 17 years ago.<sup>167</sup> At the time of the enactments, surrogacy had not gained roots and it was purely a foreign concept, vague and remote in the legislator's minds. The first case of assisted reproduction in Kenya was reported in 2006 with the birth of twins through in Vitro Fertilization (IVF). The first surrogacy babies were born in 2007.<sup>168</sup>

However, the old-fashioned Kenyan society has since changed radically and mutated overtime to a contemporary society with new felt necessities. The society has embraced the new reproductive technologies. By 2017, there were seventeen surrogate births with twenty-eight children. There are currently five fertility centers in Kenya; The Aga Khan Hospital, Nairobi Hospital, Mediheal Fertility centre, Eldoret fertility centre and the Nairobi IVF Centre.<sup>169</sup> The practice has since received judicial recognition in the famous cases of AMN and JLN, where the courts recognized and enforced a surrogacy arrangement. In addition, the issue has captured public attention, and it is openly discussed on public forums and in social media.<sup>170</sup>

---

<sup>165</sup> The Act came into force on 9<sup>th</sup> June 1928. Needless to say, this was centuries before the first in vitro fertilization enabled birth occurred on 25<sup>th</sup> July 1978.

<sup>166</sup> The Amendment was brought by Act No. 7 of 1990.

<sup>167</sup> The Act was assented on 31<sup>st</sup> December, 2001 and it came into force on 1<sup>st</sup> March 2002.

<sup>168</sup> Robai Ayieta (n 25) p. 5.

<sup>169</sup> Ibid.

<sup>170</sup> Arthur Okwemba, 'A Surrogate mother speaks: I rented out my womb for Sh 650, 000' *Daily Nation* (Friday February 3 2012). Benson Wambugu, 'A tale of two mothers and surrogate twins' *Daily Nation* (Saturday July 5 2014). Eunice Kilonzo, 'For couples facing infertility, science offers a lot of hope in the form of assisted reproduction' *Daily Nation* (April 3 2018).

## **3.2 Case law on the Recognition and Enforcement of Surrogacy Arrangements**

### **3.2.1 Introduction**

Kenyan courts have appreciated the new challenges and are well in touch with the felt necessities of the contemporary Kenyan society. Courts have taken judicial notice of the radical changes in the societal conception of surrogacy, and the practice has been accepted as a viable option of attaining parenthood especially for parents who cannot bear children through the conventional childbearing process.<sup>171</sup> What is more, the court have expressed their willingness to adjudicate surrogacy disputes, despite the absence of a law in Kenya regulating surrogacy. They have circumvented the lacuna by adopting a transformative interpretation of the constitutional principle of best interest of the child. The Courts have held that the paramountcy of the child's best interests applies on all decisions affecting the child, the absence of enabling provisions notwithstanding.<sup>172</sup>

However, the Kenyan Courts have developed an unstructured and intermittent jurisprudence on the recognition and enforcement of surrogacy arrangements. The emerging jurisprudence emanates from three cases, all of which have significant and special contribution to the emerging jurisprudence on the recognition and promotion of surrogacy in Kenya. They are; WKN, CWW & JLN v National Council for Children Services,<sup>173</sup> JLN v Director of Children Services<sup>174</sup> and AMN v Attorney General.<sup>175</sup>

---

<sup>171</sup> JLN (n 28) para. 40.

<sup>172</sup> Ibid para. 39.

<sup>173</sup> WKN (n 27).

<sup>174</sup> JLN (n 28).

<sup>175</sup> AMN (n 29).

### 3.2.2 The WKN Case

The WKN, CWW & JLN case broke the ice on the judicial recognition of surrogacy. The case interpreted the provisions of the Birth and Deaths Registration Act within the context of a surrogacy arrangement. The fundamental question for determination was deciding whose particulars should be entered into the birth notification as a parent; whether it was the commissioning mother's or the surrogate mother's particulars.<sup>176</sup> In a rather bold step, the court ordered the hospital and the registrar of Births to enter the names of the commissioning parents in their birth notifications and their birth certificates respectively. In addition, it granted the custody of the twins to the couple (WKN and CWW). Further, it the court granted the surrogate mother unrestricted access to newborns for regular breastfeeding.<sup>177</sup> These orders were subsequently affirmed in the subsequent case of JLN.

### 3.2.3 The JLN Case

The orders issued in WKN case sent shockwaves within the legal practice, which culminated to the Constitutional petition in the case of JLN v Director of Children Services. Essentially, the petition interpreted the Kenyan constitutional framework on the right to privacy within the surrogacy context. Although the petition was founded on the same facts of *WKN*, it was particularly concerned with the enforcement of the couple's fundamental rights and freedom.<sup>178</sup> Chiefly, the court had to determine whether the hospital had violated the parties' rights to privacy and human

---

<sup>176</sup> In this case, parties entered into a surrogacy arrangement. Upon the birth of the child, dispute arose as to whose particulars would go into the birth notifications. The Hospital notified the Director of Children Services of the Surrogacy arrangements, who in return took the view the children required some special care and as a result took the newborns to a Children's home. Consequently, the commissioning parents, together with the surrogate mother obtained court orders to prevent the newborns from being adopted. Later, the newborns were handed over to the surrogate, whose particulars were entered into the birth notification.

<sup>177</sup> JLN (n 28) para 2.

<sup>178</sup> Ibid, para 3.

dignity,<sup>179</sup> by informing the Director of children of the surrogacy arrangement between the petitioners. In addition, the court had to decide whether the Director for Children Services had violated any of the parties' rights when he took the newborns away.<sup>180</sup>

On the first issue for determination, the court found that the mere fact that the Hospital informed the Director about the surrogacy arrangement did not violate the parties' rights to privacy. The holding was influenced greatly by the absence of a law on surrogacy. The court found that the hospital had legitimate concerns that qualified the Director's input<sup>181</sup> and equally, it was reasonable for it to consult the Registrar of Births.<sup>182</sup> The conduct of the hospital was justified as it was in conformity with the written law. Both the Children Act and the Births and Deaths Registration Act imply that the particulars to be included in the birth notification are those of the birth mother. Consequently, the court found that the Hospital was justified in registering the surrogate mother as the birth mother.

On the second question, the court faulted the Directors conduct and especially the taking way the newborns to the Children's home. The court found this conduct as a violation of the parties' rights to human dignity and fundamental freedoms, since the actions were not justified in law. The Director's conduct had caused them agony and humiliation to the commissioning parents,<sup>183</sup> there was no dispute between the commissioning parents and the surrogate mother, and the newborns were not require any special care as it had been alleged by the Director. The court reasoned that

---

<sup>179</sup> Constitution of Kenya, Article 31.

<sup>180</sup> JLN (n 28) para 4.

<sup>181</sup> Children Act s 38 (1). The Director is obliged to safeguard the welfare of children and shall in particular assist in the establishment, promotion, co-ordination and supervision of services and facilities designated to advance the well-being of children and their families.

<sup>182</sup> JLN (n 28) para 26.

<sup>183</sup> Ibid, para 37.



the newborns were rightfully in rights hands, and under optimal care, meaning they did not require any special care and treatment.<sup>184</sup>

The court in JLN gave a landmark decision on the constitutional rights of a child born through a surrogacy arrangement. The court's interpretation of the Constitution illuminated on the rights of a surrogate child with respect to the constitutional provisions on fundamental rights and freedoms. The court held that a child born out of a surrogacy arrangement is no different from any other child, and thus entitled to the constitutional protection provided for under Article 53 as read together with the Children Act.<sup>185</sup> In particular, the child has the right to certainty of their parentage, a right to family, a right to a name acquired through issuance of a birth certificate, a right to access health services and a right not to suffer discrimination of any form arising from their surrogate birth.<sup>186</sup>

### **3.2.4 The AMN Case**

Almost immediately after the JLN case, the High court has since rightly re-stated the Kenyan position on surrogacy in the case of AMN.<sup>187</sup> In a summary, a birth notification and a birth certificate had been issued bearing the particulars of the commissioning parents, as opposed to the

---

<sup>184</sup> Ibid, para 36.

<sup>185</sup> Constitution of Kenya, Article 53 and Children Act s 11.

<sup>186</sup> JLN (n 28) para 24.

<sup>187</sup> A couple sought the services of a surrogate mother, through IVF. The parties made a surrogacy agreement, and at the end of the process the surrogate delivered twins at Kenyatta National Hospital. Thereafter and after taking legal advice from the Attorney General, the Hospital issued a Birth Notification Certificate indicating that the commissioning parents were the parents of the twins. And their birth certificates were subsequently issued with the particulars. Later, the commissioning parents applied for British Citizenship for the children and to enable them travel to the United Kingdom. However, the application was unsuccessful as the UK Passport Office claimed that the application would only go through if the children had a British parent named on their birth certificate. According to the Office, the details given on the birth certificate were found not to be true, as Kenyan law did not provide for surrogacy. The Office gave the parents two options; Adoption process or Registration of the Children as British citizens. Ultimately, the couple had to properly adopt the twins in order to meet both the expectations of the law in Kenya and the UK.

particulars of the Surrogate mother. The main issue for determination was whether the birth certificates issued to the surrogate twins were properly issued under the Kenyan legal regime.<sup>188</sup> The other issue for determination was who the lawful mother of the twin children was.<sup>189</sup> The court held that the birth certificates were unlawfully issued contrary to section 22 of the Births and Deaths Registration Act<sup>190</sup> and that the only available procedure in Kenya today is adoption under the Children's Act.<sup>191</sup>

On the second issue, the Court reiterated the Kenyan position that the surrogate mother is the recognized legal mother of a surrogate child, as contemplated by the Children Act and the Birth and Death Registration Act. Based on authorities from other jurisdictions,<sup>192</sup> the Court held that the host woman is presumed in law to be the mother of a surrogate child until other legal processes are applied to transfer legal motherhood to the commissioning woman.<sup>193</sup> As a result, it held that the surrogate mother was the legal mother until a legal process is invoked to transfer legal parenthood to the mother. This finding collaborates the two Act's underlying assumption that the woman who bears the child is the legal mother of the child.

The Court in AMN hand-ringed about how administrative bodies and the executive had gone ahead of parliament with respect to the registration of the surrogate twins and regretted that the only remedy rested with the parliament. In the JLN case, the AG did not contest the decision of the Children Court in WKN, that the names of the commissioning parents be entered in the birth

---

<sup>188</sup> AMN (n 29) para 24.

<sup>189</sup> Ibid, para 25.

<sup>190</sup> Ibid, para 32.

<sup>191</sup> Ibid, para 49.

<sup>192</sup> In R: X & Y (Foreign surrogacy) [2008] EWHC 3030 (Fam); Re X (A child) [2014] EWHC 3135 (Fam); In the ex-parte matter between WH & Others at para 52.

<sup>193</sup> AMN (n 29) para 29.

certificates.<sup>194</sup> Similarly, in the AMN case, the AG had advised the commissioning parents on the procedure to follow in obtaining birth certificates. However, the Court treated the AG's advice as ultra vires and contrary to the Birth and Death Registration Act. As a result, it overruled the AG's decision and advice, holding that the only remedy to the lacuna lies with the parliament passing an enabling statute.<sup>195</sup>

### **3.2.5 A critique of the Three Cases: WKN, JLN and AMN**

In most instances, the Kenyan courts have gone ahead of the parliament with respect to adherence to legal process of registration of births in Kenya. This usurping of powers has been demonstrated by how the courts have made orders to have the names of the commissioning parents entered into the birth notifications and certificates. In the WKN case, the court ordered the names of the commissioning parents be entered into the birth notification as well as the certificates of the surrogate twins.<sup>196</sup> In JLN, the court impliedly affirmed the Children Court's decision to have the names of the commissioning parents entered into the birth certificates and notification.<sup>197</sup> What is more, these usurping judgments are still constitutional as they have not been subsequently overruled.

The back and forth movement of the Kenyan courts on their treatment and approach to surrogacy has occasioned uncertainty in the legal practice. Both intending parents and surrogate mothers are unable to plan with certainty as surrogacy arrangements might expose them to criminal

---

<sup>194</sup> See JLN (n 28) para, 7. In fact, both the AG and the Director of Children's Services argued that the matter was indeed settled.

<sup>195</sup> AMN (n 29) para 46.

<sup>196</sup> JLN (n 28) para 4.

<sup>197</sup> JLN (n 28) para 7. However, the court's conduct in JLN can be justified on several grounds. One, the State, through the AG and the did not contest the decision of the Children's Court. This way, the court could not have acted out of own motion.

prosecutions. For instance, a Kenyan surrogate mother was in July 2018 charged with child trafficking, alongside the commissioning parents, notwithstanding the two parties having made a comprehensive surrogacy agreement.<sup>198</sup> Their lawyers issued documents pertaining to ‘legal formalities,’ among them a copy of an agreement between the mother and the commissioning couple.<sup>199</sup> Criminal prosecutions in such circumstances are unwarranted and an affront to the constitutional right to privacy and human dignity.

### 3.3 Self-Regulation

Having no clear legal, institutional and policy framework, the practice of surrogacy has remained under self-regulation, which has been left to the stakeholders to run it their way. The major stakeholders are the five medical centres that offer fertility treatment; The Aga Khan Hospital, Nairobi Hospital, Mediheal Fertility centre, Eldoret fertility centre and the Nairobi IVF centre. These centers<sup>200</sup> rely on their personal interpretation of what is required during the administration of the process.<sup>201</sup><sup>202</sup> This regulation is within the confines of the Law of Contract Act, the Children Act, the general doctrines of contract law and other relevant statutes. As such, the whole process is buttressed on legal processes like child adoption, as provided for under the Children Act.<sup>203</sup>

The Centers have adopted specific soft law procedures and guidelines, which entail in-house counselling processes featuring the parties to the surrogacy arrangement. The procedures are

---

<sup>198</sup> Stella Cheron, ‘Mombasa woman gives birth, gives away baby to Chinese’ *Daily Nation* (July 31 2018).

<sup>199</sup> The agreement provided that the surrogate mother would rent her womb and be paid Sh 30, 000 per month, Sh 28, 500 each month for the entire gestation period and a final sum of Sh 500,000, after documentation of the child and release through court procedure to the intended parents.

<sup>200</sup> This paper concentrates on the surrogacy process adopted by the Nairobi IVF centre. It is the only centre which currently practices surrogacy.

<sup>201</sup> Robai Ayieta (n 25) p. 17.

<sup>202</sup> Wathika Linda (n 26) p. 22.

<sup>203</sup> Part XI of the Children Act, CAP 141, Laws of Kenya.

designed to empower the parties make an informed choice. The process entails a comprehensive analysis of the possible health, and social effects of participating in the surrogacy procedure. For the surrogate mother, she is sensitized about any potential health risks inherent in the procedure, both short term and long-term, and the psychological effects of being a surrogate. In addition, the parties are informed on their legal obligations and responsibilities throughout the procedure.

The Centres have specific guidelines of determining the suitability of the Surrogate mother. Some of the necessary requirements are informed by the health and welfare of the child, the capacity of the surrogate mother to enter into this distinctive arrangement. She must be of at least 21 years old, of sound mind and produce a certificate of good conduct from the DCI. What is more, she must be physically healthy and free of any specified diseases and must have one living child. The selected surrogate mother is afterwards contacted, avails herself at the fertility centre where she too undergoes the in house counselling on the process. Afterwards, a formal introduction between the two parties is done in preparation of a group counseling session.<sup>204</sup>

The group counseling session is the last stage before the commencement of the surrogacy procedure. The In-house advocate highlights legal rights and obligations, which relate to the parties, after which a surrogacy arrangement is drafted. The parties are accorded sufficient time to interrogate the agreement clauses after which they sign.

### **3.3.1 Legal Challenges facing the Self-Regulation Model**

Notwithstanding all these complex procedures and processes, the commissioning parents cannot directly acquire legal parenthood without doing child adoption under the Children Act. Like the usual births, the registration of children born out of a surrogacy arrangement is done under the

---

<sup>204</sup> Robai (n 25) p. 18.

Births and Deaths Registration Act.<sup>205</sup> A notice of birth is issued indicating the name of the mother, the place of birth, the sex of the child and the date of birth.<sup>206</sup> The name of the mother on the notice of birth is that of the surrogate, and accordingly her name appears on the birth certificate.<sup>207</sup> Consequently, the surrogate mother is listed as the legal mother to the child and hence she has the legal parenthood. The commissioning parents then initiate the process of acquiring legal parenthood. In practice, they legally adopt the child from the surrogate.<sup>208</sup>

In addition to the adoption process, the commissioning parents are subjected to further procedures, which have to be done before the adoption process is done. One or both commissioning parents have to undergo a DNA test to show relation to the child.<sup>209</sup> However, these institutionalized guidelines and procedures have attracted much criticism. They have been criticized for being lengthy and stringent, exposing the practice to corruption practices to speed up the process.<sup>210</sup> As a result, the absence of a clear legal, institutional and policy framework on surrogacy has occasioned the emergence and preference of illegal practices amongst the commissioning parents.

The inefficiency and ineffectiveness of self-regulation has been manifested by its inability to address and curb the rampant emergence of ‘illegal surrogacies’ in Kenya. In a bid to circumvent the adoption process, two practices have emerged. The most common ‘back street’ route is identity forgery. The surrogate mother uses the identity of the commissioning mother throughout her pregnancy and at the date of delivery. In this way, the name of the commissioning mother is entered on the notification of birth and thereafter on the certificate of birth at registration.<sup>211</sup> The second

---

<sup>205</sup> Act No. 2 of 1928. Cap 149.

<sup>206</sup> Wathika Linda (n 26) p. 23.

<sup>207</sup> Robai (n 25) p. 20.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

<sup>210</sup> Ibid.

<sup>211</sup> Robai (n 25) p. 20.

common route involves acquiring a forged birth notification letter from a medical facility. The emergence of these dubious practices is just but the tip of an iceberg signifying that self-regulation has failed, and it is no longer the most preferred model of regulating the surrogacy practice in Kenya.

### **3.3.2 The Assisted Reproductive Technology Bill, 2016**

To some extent, the Kenyan parliament has indicated its intention to establish a legal, institutional and policy framework for the surrogacy practice. Such positive intention can be construed from the examination of the Assisted Reproductive Technology Bill, 2016.<sup>212</sup> The Bill offers a broader definition of the term mother than the definition offered by the Children Act.<sup>213</sup> Further, the Bill offers a clear distinction between the rights of a surrogate mother<sup>214</sup> and the rights of the mother. While a surrogate mother has no rights of legal parenthood, the mother has absolute legal parenthood. Should the Bill be passed to law, this enactment will lay to rest the ghost which has complicated the intricate process of determining legal parenthood in the surrogacy arrangements.

In addition, the Bill has addressed some fundamental questions, which go to the root of the surrogacy practice. The Bill distinguishes between commercial surrogacy and altruistic surrogacy. It permits altruistic surrogacy and perhaps, impliedly, proscribes commercial surrogacy. Monetary benefits shall not be awarded to the surrogate mother unless for expenses incurred during the undertaking of the process.<sup>215</sup> This is a material development as the distinction is well acknowledged in the surrogacy literature.

---

<sup>212</sup> The Bill was formerly known as the Reproductive Health Care Bill 2014.

<sup>213</sup> Assisted Reproductive Technology Bill, 2016 s 2.

<sup>214</sup> Assisted Reproductive Technology Bill, 2016 s 2.

<sup>215</sup> Assisted Reproductive Technology Bill, 2016 s 32.

The Bill provides for an institutional framework on surrogacy through establishing a powerful authority, which has extensive functions and powers sufficient to effectively oversee the practice. It seeks to establish the Assisted Reproductive Technology Authority, whose sole mandate will be to regulate the industry through issuing of regulations and guidelines, granting of licenses and offering professional advice to parties seeking surrogacy services.<sup>216</sup> In addition, the composition of the Board is commendable, considering its inclusion of persons with relevant experience on Human Rights, Women and Children rights and experienced medical doctors.<sup>217</sup>

In addition, the Bill buttresses the constitutional principles of human dignity and privacy. This is evident from the articulation of the rights of various parties to a surrogacy arrangement, which will be based on the free consent of the parties. The Bill provides for safe storage of any information on the surrogacy arrangement, by providing for very special occasions when such information might be disclosed to the child born pursuant to the surrogacy arrangement and to any government agency.<sup>218</sup> It also ensures that the procedures are done in a manner that does not disrepute the human dignity by regulating on the issuance of licenses to qualified health facilities, prohibition on seeking assisted reproductive services for speculative reasons and as an experiment in any research trials done with the aim to modify the human race.<sup>219</sup>

Largely, the Bill places a high premium on the safety of the surrogacy procedures by incorporating the role of professionals in the entire surrogacy process. The Board may seek the services of experts and consultants in the discharge of its functions.<sup>220</sup> Two of the members of the board are

---

<sup>216</sup> Assisted Reproductive Technology Bill, 2016 s 5 (a).

<sup>217</sup> Assisted Reproductive Technology Bill, 2016 s 7 (d).

<sup>218</sup> Assisted Reproductive Technology Bill, 2016 s 34 and 36 (1).

<sup>219</sup> Assisted Reproductive Technology Bill, 2016 s 23.

<sup>220</sup> Assisted Reproductive Technology Bill, 2016 s 13.



medical doctors possessing distinguished knowledge and experience in reproductive health.<sup>221</sup> In addition, the Bill offers maximum insulation of the practice against exploitative practices. Surrogacy can only be done solely for human procreation purposes and their on medical or health grounds.<sup>222</sup> Further, the Bill provides for altruistic surrogacy while prohibiting commercial surrogacy, by limiting monetary payments to the surrogate mother to the expenses reasonably incurred.<sup>223</sup> Furthermore, the Bill places high premium on the protection of children. A child cannot be a party to a surrogacy arrangement.<sup>224</sup>

The Bill places a high premium on the rights of the commissioning parents, by offering certainty in the transfer of legal parenthood from the surrogate mother to the intending parents. It provides for an automatic transfer of legal parenthood at birth, thereby saving the commissioning parents the agony of undergoing other additional procedures of acquiring parenthood.<sup>225</sup> Any dispute on the parentage of the child must be challenged within 6 days of the delivery.<sup>226</sup>

The Bill ensures a wider accessibility of the services to several group of persons, irrespective of their marital status. The assisted reproduction services are available to married heterosexual couples. In addition, single persons can equally acquire parental rights through a parental agreement. An unmarried woman can acquire legal parenthood through assisted technologies, provided she can secure a parental agreement with a sperm donor, through which the man can also acquire parental rights of a father.<sup>227</sup>

---

<sup>221</sup> Assisted Reproductive Technology Bill, 2016 s 7 (d) (i).

<sup>222</sup> Assisted Reproductive Technology Bill, 2016 ss 21-22.

<sup>223</sup> Assisted Reproductive Technology Bill, 2016 s 32 (5).

<sup>224</sup> Assisted Reproductive Technology Bill, 2016 s 25.

<sup>225</sup> Assisted Reproductive Technology Bill, 2016 s 31.

<sup>226</sup> Assisted Reproductive Technology Bill, 2016 s 32 (4).

<sup>227</sup> Assisted Reproductive Technology Bill, 2016 s 2 (a).

These positive attributes of the Bill notwithstanding, the proposed regime is inadequate in several aspects, particularly on the efficacy of the proposed institutional framework. To some extent, the proposed Authority is inherently ineffective, considering the composition of its board, which has incorporated inadequate input of professionals with wide knowledge on surrogacy. In addition, it fails to expressly make a clear distinction between full and partial surrogacy, whose distinction is key for the determination of the rights of the surrogate mother. The wording of the Bill does not grant more rights to a genetic surrogate mother, who also donated her egg for the purposes of the surrogate arrangement. The Bill does not grant her some grace period, within which to reconsider the surrendering of the newborn, because she could have since developed some attachment to the newborn.

The Bill places minimal significance to the surrogacy practice, and places more interest in the general topic of assisted reproduction. While surrogacy practice is part of the wider assisted reproductive procedures, the Bill has put less emphasis on the subject of surrogacy itself. In fact, surrogacy appears under two sections.<sup>228</sup> Consequently, the Bill does not provide for the rights and obligations of parties to surrogacy arrangements, especially the surrogates, and the provision of these crucial rights has been left at the discretion of the Cabinet Secretary.<sup>229</sup>

The Bill is limited on various aspects, especially on the recognition and enforcement of international surrogacies. It does not provide for channels under which Kenyan courts can recognize and give effect to surrogacy arrangements with international elements. In addition, the proposed regime does not offer maximum protection of the proposed system from the misuse by foreigners, who are not domiciled in Kenya. The Bill does not stipulate whether the applicants

---

<sup>228</sup> Assisted Reproductive Technology Bill, 2016 s 31 and 32.

<sup>229</sup> Assisted Reproductive Technology Bill, 2016 s 59 (g).

must have a special attachment to Kenya. This position renders the proposed regime vulnerable to ‘surrogacy forum seekers’ under which foreigners will fly in and carry out a surrogacy arrangement and leave the country.

The proposed regime does not conform to the constitutional principles on the non-discrimination and the best interest of the child. The Bill does not recognize the best interest of the child and it limits the accessibility of surrogacy to married couples only. In addition, the Bill does not promote and protect the constitutional rights of sexual minorities and unmarried persons. It reserves Surrogacy services to the heterosexual couples, excluding same-sex couples from accessing these services.<sup>230</sup> In addition, the Bill does not provide for ways in which unmarried persons can acquire legal parenthood pursuant to a surrogacy agreement.

### **3.4 Conclusion**

Conclusively, Kenya does not have a clear legislative, institutional and policy framework for the practice of surrogacy, save for some constitutional rights; the right to have a family and the right to access and utilize assisted reproductive technologies, among others. Both the Children Act and the Birth and Death Registration Act do not provide for surrogacy since they make a fundamental assumption that the legal mother of the child is the woman who carries the pregnancy and bears the child. The absence of a clear framework on surrogacy has abandoned the practice of surrogacy to self-regulation. However, self-regulation has not proved its resilience as a viable regulation model and its inefficiency has been manifested by its inability to address and curb the rampant emergence of ‘illegal surrogacies’ in Kenya.

---

<sup>230</sup> Assisted Reproductive Technology Bill, 2016 s 2.

Kenyan courts have appreciated the new challenges and are well in touch with the felt necessities of the contemporary Kenyan society. However, they have developed an unstructured and intermittent jurisprudence on the recognition and enforcement of surrogacy arrangements. In most instances, the Kenyan courts have gone ahead of the parliament with respect to adherence to legal process of registration of births in Kenya. While some courts have held that the names of the commissioning parents should be entered into the birth notification as well as the certificate of the child, others have held that such issuance of birth certificates is unlawfully. This back and forth movement of the Kenyan courts on their treatment and approach to surrogacy has occasioned uncertainty in the legal practice.

## **CHAPTER FOUR**

### **A COMPARATIVE ANALYSIS OF THE LEGAL FRAMEWORK ON SURROGACY IN KENYA, UK, SOUTH AFRICA**

#### **4.0 INTRODUCTION**

This chapter offers a comparative analysis on the legal frameworks of two jurisdictions; the UK and South Africa, with a view to investigate the best practices, which Kenya can draw from their experiences. The chapter has three main parts. The first part features the UK jurisdiction, under which it offers a critical analysis of the UK's legal framework, coupled with a segmented analysis of its strengths and its challenges in its pursuit of achieving an ideal regime for the protection of surrogacy practice as a human right. The second part features South Africa and takes the same format as the first part. Lastly, the chapter offers a conclusion, which summarizes the ideas, conversed throughout the chapter.

#### **4.1 LEGAL FRAMEWORK ON SURROGACY IN THE UK**

##### **4.1.1 An Overview of the Introduction and the Operation of The UK Laws on Surrogacy**

The UK regime on Surrogacy is founded on four major principles; The non-enforceability of a surrogacy arrangements, the prohibition of commercial surrogacy, the utility of parental orders to effect transfer of legal parenthood from the surrogate mother to the commissioning parents and the role of the court in granting parental orders. These principles are embedded on a comprehensive legal framework, whose history can be traced to the Surrogacy Arrangements Act of 1985 whose enactment was a legislative response to public outcry, which had depicted surrogacy arrangements as immoral and socially undesirable.

To a great extent, the introduction and the subsequent advancement of UK surrogacy laws is crisis-driven. It all started in 1976 when a surrogate mother, who had offered commercial surrogacy, changed her mind and declined to surrender her newborn to the commissioning parents. In determining the dispute, the court registered its disapproval for commercial surrogacy by terming it as a sordid commercial bargain.<sup>231</sup> The birth of ‘Baby Cotton’ in 1985 through commercial surrogacy led to a public outcry with the surrogate mother being accused of engaging in ‘child selling.’<sup>232</sup> With this background, the UK court in the resultant legal dispute<sup>233</sup> engaged its role in social engineering, upon which it granted wardship to the commissioning parents, while pointing out to the difficult and delicate problems of ethics, morality and social desirability raised by surrogacy.<sup>234</sup>

Surrogacy arrangements in the UK do not confer an automatic legal parenthood to the commissioning parents; instead, they have to apply for a parental order after the birth of the child to effect the transfer of legal parenthood in their favour. Anyone intending to obtain the parental order has to meet certain conditions, which largely, ensure that the practice is not open to exploitation, it is restricted within the UK and it is accessible to the most deserving persons for the welfare of the child and the surrogate mother. The applicant has to be a married couple, the application has to be made within six months of the birth of the child,<sup>235</sup> one of the parents has to be domiciled in the UK, the applicants have attained 18 years and either one or both the husband and the wife share a genetic makeup with the child.<sup>236</sup>

---

<sup>231</sup> A v C [1985] FLR 445.

<sup>232</sup> Rebecca Ridsdale, ‘A brief history of surrogacy law in the UK’ *VARDAGS* (February 13, 2018)

<sup>233</sup> Re C (A Minor) (Wardship: Surrogacy) [1985] FLR 846.

<sup>234</sup> Amel Alghrani and Danielle Griffiths, ‘The regulation of surrogacy in the United Kingdom: the case for reform’ (2017) Vol. 29 (2) *Child and Family Law Quarterly* p. 167.

<sup>235</sup> Human Fertilisation and Embryology Act 1990 s 30 (2,3,4).

<sup>236</sup> M Crawshaw, E Blyth and O Akker, ‘The changing profile of surrogacy in the UK – Implications for national and

#### 4.1.2 The Ban on Commercial Surrogacy in the UK

The UK regime advocates for altruistic surrogacy and prohibits commercial surrogacy. The law permits the commissioning parents to pay to the surrogate mother any reasonable expenses incurred.<sup>237</sup> During the making of the parental order, the court must be satisfied that no money or other benefits has been given or received by the husband or the wife for or in consideration of the making of the parental order.<sup>238</sup>

Taken as a whole, the UK regime conveys a clear theme all through; minimizing the potential commercialization of surrogacy and the exploitative aspects of the practice in the UK. There is no doubt this UK position was influenced by the *Warnock Committee* which had foreseen that the legalization of surrogacy in the UK would lead to emergence of agencies which would be recruiting women to the surrogacy industry and negotiate surrogacy arrangements on behalf of those wishing to utilize the services of a surrogate.<sup>239</sup> To address these concerns, the committee did not approve commercial surrogacy, maintaining that procuring surrogacy services merely for convenience was ethically intolerable.<sup>240</sup>

The UK's prohibition on commercial surrogacy is very articulate, buttressed by prohibitions on advertising surrogacy arrangements, and the role of intermediaries in the initiation and negotiating of surrogacy arrangements.<sup>241</sup> The UK legislation has adopted a very severe view on

---

international policy and practice' (2012) 34(3) *Journal of Social Welfare and Family Law* pp. 265-6. See Human Fertilisation and Embryology Act 1990 s 30 (1).

<sup>237</sup> Brunet, Laurence, King, Derek, Davaki, Konstantina, McCandless, Julie, Marzo, Claire and Carruthers, Janeen (2012) *Comparative study on the regime of surrogacy in the EU member states*. European Parliament, Brussels, Belgium p. 62.

<sup>238</sup> Human Fertilisation and Embryology Act 1990 s. 30 (7).

<sup>239</sup> The Warnock Committee (n 4) para 8.18.

<sup>240</sup> Amel Alghrani and Danielle Griffiths (n 234) p. 168.

<sup>241</sup> Human Fertilisation and Embryology Act 1990 s 2 (1). Persons other than the surrogate mother and the commissioning father, are proscribed from initiating any negotiations for the formation of a surrogacy arrangement or participating in the negotiation for the formation of a surrogacy arrangement for commercial gains.

advertisements about surrogacy. There is a very extensive prohibition on advertisements about surrogacy, as it covers a variety of platforms including newspapers, periodicals, electronic communications network.<sup>242</sup> Further, the law regulates the role played by body corporates, incorporate or otherwise, in the initiation and negotiation for the formation of a surrogacy arrangement. Although the law contemplates a situation where a body corporate might take part in the negotiations or facilitation of the making of the arrangement, it prohibits the body corporates from undertaking this role for commercial purposes.<sup>243</sup>

The UK regime on surrogacy has employed several criminal sanctions to ensure compliance with the prohibitions on negotiating surrogacy arrangements for commercial purpose and on advertisements. A person who violates the prohibition on initiating and negotiating surrogacy arrangements for commercial purposes is liable to pay some fines or to serve an imprisonment term of at most three months or both.<sup>244</sup> For those guilty of making advertisements, they are liable to pay some fine but without the alternative of serving an imprisonment term.<sup>245</sup> Such criminal liabilities extend to directors, secretaries, managers and members of a corporate entity especially where it is established that the violation was done with their consent, out of their negligence or connivance.<sup>246</sup>

---

<sup>242</sup> The prohibited advertisements are those containing an indication that a certain person is willing to enter into a surrogacy arrangement or in the alternative, an indication that a certain person is looking for a woman willing to become a surrogate mother. See UK Surrogacy Arrangements Act 1985 s 3 (1).

<sup>243</sup> UK Surrogacy Arrangements Act 1985 s 5.

<sup>244</sup> *Ibid*, s 4 (1).

<sup>245</sup> *Ibid*, s 4 (1) (b).

<sup>246</sup> *Ibid*, s 4 (3).



## 4.2 THE PILLARS OF THE UK'S SUCCESSFUL REGULATION ON SURROGACY

### 4.2.1 A comprehensive Institutional and Policy Underpinning the Legal Framework

The UK legislative framework on surrogacy is based on a very sound policy framework. The legal tussle in *A v C* sent shortwaves to the then existing legal framework, prompting the formation of the Committee of inquiry into Human Fertilization and Embryology in 1984, which informed the enactment of the initial UK Surrogacy Arrangements Act of 1985.<sup>247</sup> Later amendments to the 1985 Act were informed by the 1987 White Paper,<sup>248</sup> which preceded the enactment of the Human Fertilisation and Embryology Act 1990 on which the Human Fertilisation and Embryology Authority is established.

More amendments to the 1985 Act were influenced by the Brazier Report of 1997, which introduced major changes on the original Act.<sup>249</sup> Later amendments to the 1990 Act in the years between 2004 and 2007 were informed by a consultative paper,<sup>250</sup> which sought to place the law at par with technological advancements in the human reproductive fields. In addition, the UK regime has a solid institutional framework, on institutions, which foresee the implementation of the surrogacy laws within UK. Human Fertilisation and Embryology Authority, the British Surrogacy Centre and Childlessness Overcome Through Surrogacy (COTS).<sup>251</sup>

---

<sup>247</sup>The Warnock Committee (n 4).

<sup>248</sup> The White Paper *Human Fertilisation and Embryology: A Framework for Legislation*, Cm 259 (1987).

<sup>249</sup> Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, Cm 4068 (1998) – hereafter ‘The Surrogacy Review’, para 6.5, p 49.

<sup>250</sup> Department of Health’s consultation document, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (Department of Health, 2005).

<sup>251</sup> *Ibid.*

#### **4.2.2 Maximum Protection of the Rights of the Surrogate Mother and Same-sex Couples**

Largely, the UK regime places high premium on the autonomy of the surrogate mother and the biological father of the child, especially where the genetic father is not the husband in the commissioning couple. It guarantees the concept of individual human dignity and minimizes instances of coercion and undue influence. Act does not provide for the enforceability of surrogacy arrangements.<sup>252</sup> In determining an application for the parental order, the court must be satisfied that both the biological father of the child, where he is not part of the commissioning couple, and the surrogate mother have granted their unequivocal consent to the making of the parental order.<sup>253</sup> The surrogate mother does not have capacity to consent to grant of a parental order, within the first six weeks after the child's birth.<sup>254</sup> Further, the granting of a parental order is supported by the report of a social worker, who is appointed by the court to investigate particular social aspects of the commissioning parents.<sup>255</sup>

Further, the UK regime has a robust approach, which is not limited by the sexual orientation of the commissioning parents as it enables both heterosexual and same-sex couples to access surrogacy services. Persons in same-sex relationship can make a parental order and it can be applied by two persons living together as partners in an enduring family relationship provided the partners are within the permitted degrees of relationship.<sup>256</sup>

---

<sup>252</sup> Surrogacy Arrangements Act 1985 s 1A.

<sup>253</sup> Brunet, Laurence (n 237) p. 61. See Human Fertilisation and Embryology Act 1990 s 5.

<sup>254</sup> Human Fertilisation and Embryology Act 1990 s. 30 (6).

<sup>255</sup> M Crawshaw, E Blyth and O Akker (n 236) p. 266.

<sup>256</sup> Human Fertilisation and Embryology Act 2008 s 54.

### **4.3 NEGATIVE ATTRIBUTES OF THE UK LEGAL REGIME ON SURROGACY**

To some extent, the UK law on surrogacy has conflicting statutory provisions, breeding uncertainty and unstructured jurisprudence on surrogacy. These conflicts are more conspicuous when the courts interpret the relevant statutes simultaneously. The Human Fertilisation and Embryology (Parental Orders) Regulations 2010,<sup>257</sup> which amplify the provisions of the 2008 Act<sup>258</sup> and a 2002 Act,<sup>259</sup> provide that the child's welfare is the most paramount consideration, which the court has to consider when making a parental order.<sup>260</sup> This new development is a sharp contrast of the several conditions, which the court is required to consider when making a parental order under the 1985 Act. The effects of this legislative has been that on some occasions, the court is forced to grant a parental order, even where some of the fundamental conditions under the 2008 Act have not been met.<sup>261</sup>

#### **4.3.1 Incoherence of the 'letter and the spirit' of the regulating statutes**

The presence of multiple and sometimes conflicting statutes have occasioned uncertainty on rights of parties to surrogacy arrangements. Consequently, the UK courts have produced a very unstructured jurisprudence with respect to the interpretation of the law on surrogacy. In some occasions, the courts have gone ahead of the parliament and authorized payments to a surrogate mother, on occasions where such payments exceed the permitted statutory 'reasonable expenses.'<sup>262</sup> On other occasions, the UK courts have granted parental surrogacy to a couple,

---

<sup>257</sup> SI 2010/985. Hereafter, 'the 2010 Regulations'. They are based under the 2008 Act.

<sup>258</sup> The Human Fertilisation and Embryology Act 2008.

<sup>259</sup> Adoption and Children Act (ACA) 2002 s 1.

<sup>260</sup> Brunet, Laurence (n 237) p. 62.

<sup>261</sup> Amel Alghrani and Danielle Griffiths (n 234) p. 169.

<sup>262</sup> Ibid.

against the wishes of the surrogate mother as provided for under the 1985 Act.<sup>263</sup> Similarly, the UK courts have granted parental orders for children who had been born several years earlier.<sup>264</sup>

#### **4.3.2 Laws out of Touch with the Reality and Their Inefficacy in terms of Time and Costs**

The current law on surrogacy does not represent the gradual revolution, which has since been occurring over the years with respect to surrogacy in the UK. There is a significant change in the societal perceptions of surrogacy from being seen as an immoral and unethical practice to being appraised as a very effective tool of addressing reproductive challenges in the contemporary world.<sup>265</sup> Similarly, the media has now positively and more neutrally covered surrogacy stories, depicting it as recommendable way of having a family, unlike its initial stand where it condemned the first surrogacy as immoral and unethical.<sup>266</sup> Claire and Jens argue that despite these major societal advancements, the tenets of the Surrogacy Arrangements Act 1985 have remained unchanged, rendering it outdated and out of touch with the realities of contemporary surrogacy.<sup>267</sup>

Further, in some respects, the UK regime on surrogacy is outdated and has lost its touch with the felt necessities of its subjects. Most critics are made against the mandatory six months' period provided before the intending parents can apply for a parental order. Most surrogate mothers consider this period as distressful coupled by the delay in getting the parental orders, making the surrogate mother a legal parent for a prolonged period against her wishes.<sup>268</sup> This has caused

---

<sup>263</sup> Sandy Fleming, 'Evidence UK surrogacy laws are 'nonsensical'' *The UK's European University* (May 4 2016) <<https://www.kent.ac.uk/news/society/9727/kent-legal-expert-shows-uk-surrogacy-laws-have-become-nonsensical>> Accessed on 4<sup>th</sup> November 2018.

<sup>264</sup> Ibid.

<sup>265</sup> Claire Denton-Glynn and Jens M. Scherpe, 'Surrogacy: Is the law governing surrogacy keeping pace with social change?' *Cambridge Family Law* p. 2.

<sup>266</sup> Amel Alghrani and Danielle Griffiths (n 234) p. 170.

<sup>267</sup> Claire Denton-Glynn and Jens M. Scherpe (n 265) p. 2.

<sup>268</sup> Siobhan Fenton, 'NHS hospitals forcing surrogate families to hand over newborn babies in car parks due to 'dire and outdated' laws' *Independent* (October 29 2016). <<https://www.independent.co.uk/news/uk/home-news/nhs-surrogate-births-rules-laws-parents-babies-handed-over-car-parks-a7381646.html>> Accessed on 4<sup>th</sup> November 2018.

surrogate mothers to resulting to backstreet surrogacies, where they can literally hand over the babies to the commissioning parents in a rather ridiculous and illegitimate manner.<sup>269</sup> In addition, these restrictive regulations have caused UK citizens to seek surrogacy services overseas.<sup>270</sup>

The UK position involves more procedures and expenses in the transferring of legal parenthood from the surrogate mother to the commissioning parents. Since the UK law provides that the legal parenthood automatically go to the surrogate mother upon birth of the child, the commissioning parents are forced to incur more expenses and lengthy processes to acquire the legal parenthood, through either the adoption process or obtaining a parental order.<sup>271</sup> Acquiring legal parenthood through a parental order is at least discriminatory, since it limits the persons who can benefit from such an order.<sup>272</sup> The beneficiaries of the order must be a couple, thereby eliminating single persons from utilizing from the procedure.<sup>273</sup> The legal position on this aspect is no longer as straight forward, after the enabling HFEA rules were declared unconstitutional for restricting the rights of a single person to a private and family life.<sup>274</sup>

#### **4.3.3 The Discriminatory Nature of some Legal Requirements for granting a Parental Order**

The UK's position that there must be a genetic link between the child and at least one of the intending parents is discriminatory against infertile couples and single persons. The requirement

---

<sup>269</sup> Ibid. In some instances, the surrogate mothers are forced to hand over their babies at car parks.

<sup>270</sup> M Crawshaw, E Blyth and O Akker (n 236) p. 265.

<sup>271</sup> Siobhan Fenton (n 268).

<sup>272</sup> Mishcon De Reya, 'Single parents, surrogacy arrangements and parental orders: the current situation' *LexisNexis* (November 17 2017).

<sup>273</sup> *B v C (Surrogacy: Adoption)* [2015] EWFC 17. The applicant was a single person who was a party to a surrogacy arrangement as the commissioning parent, having donated his sperms. However, his attempt to acquire legal parenthood through a parental order flopped since he was not in an enduring relationship neither married nor in a civil partnership. Without any other option, the applicant had to adopt his child.

<sup>274</sup> *Re Z (A Child) (No 2)* (where the court held that the provision amounted to an interference with the applicant's rights to a private and family life as provided for under Human Rights Act). Legislative amendments to recognize the rights of single persons to access parental orders is underway.

discriminates against infertile couple, which must require double donation.<sup>275</sup> Single persons who are genetically linked to the surrogate child cannot obtain a parental order, forcing them to adopt their child.<sup>276</sup> Similarly, in *Re Z*,<sup>277</sup> a single person, who was the biological father of the surrogate child, was denied a parental order on the reasoning that an application for a parental order had to be made by two people.<sup>278</sup>

The UK courts have generated an unstructured jurisprudence on the grant of parental orders. This has occasioned uncertainty in the manner of getting the order, vitiating the key objective of the parental orders as a tool of regulating surrogacy.<sup>279</sup> In some instances, UK courts have considered the surrogate mother's consent as draconian and have gone ahead of the parliament to grant parental orders against her wishes.<sup>280</sup> The lack of a solid jurisprudence in this area has aggravated challenges of acquiring the parental orders and the general uncertainty on the law of surrogacy both of which are feared they might fuel the exploitation of the surrogate mothers.<sup>281</sup> In addition, the law on this area does not incorporate the rights of the surrogate child to access information about their origin.<sup>282</sup>

---

<sup>275</sup> Kirsty, Natalie, Sarah, Louisa, Sarah (2015) *Surrogacy in the UK: Myth busting and reform* Report of the Surrogacy UK Working Group on Surrogacy Law Reform p. 32.

<sup>276</sup> *Re B v C* (Surrogacy: Adoption) [2015] see Horsey, K., 'A surrogacy conundrum that didn't need to be' *BioNews* (March 16 2015) <[https://www.bionews.org.uk/page\\_94963](https://www.bionews.org.uk/page_94963)> Accessed on 4<sup>th</sup> November 2018.

<sup>277</sup> *Re Z* (A Child: Human Fertilisation and Embryology Act: parental order) [2015].

<sup>278</sup> Kirsty, Natalie, Sarah, Louisa, Sarah (n 275) pp. 31-32.

<sup>279</sup> Sarah Cassidy, 'UK surrogacy laws must be reformed urgently, says leading fertility lawyer' *INDEPENDENT* (May 7 2015).

<<https://www.independent.co.uk/news/uk/home-news/uk-surrogacy-laws-must-be-reformed-urgently-says-leading-fertility-lawyer-10233685.html>> Accessed on 4<sup>th</sup> November 2018.

<sup>280</sup> *Ibid.* In 2015, a UK court granted parental order to a gay couple, against the surrogate mother who had since the birth of the child changed her mind. The court in disregarding the absence of the surrogate's consent argued that it was in the best interest of the child to be raised by her biological father and his partner.

<sup>281</sup> Antony Blackburn-Starza, 'Outdated and inadequate UK surrogacy laws set for reform' *The Fertility Show* (May 8 2018).

<sup>282</sup> Monidipa Fouzder, 'Commission begins work on 'not fit for purpose' surrogacy laws' *The Law Society of England and Wales Gazette* (May 4 2018).

In addition, the parental orders in the UK no longer play their intended role in the regulation of the practice since UK courts are more inclined to grant a parental order, non-compliance with some statutory requirements notwithstanding. Regulating an already executed contract through the grant of parental orders is less meaningful especially in cases involving a foreign child, where the refusal of the grant will prejudice the rights of the child and render it stateless.<sup>283</sup> Further, the introduction of the 2010 rules,<sup>284</sup> which incorporated ‘the best interests of the child’ as a paramount consideration when determining whether to grant a parental order has undermined the capability of a court to disapprove a parental order.<sup>285</sup>

#### **4.3.4 UK’s prohibition of Commercial Surrogacy**

The UK’s stance on prohibition of commercial surrogacy is no longer intact, and UK courts have evenly approved apparently commercial surrogacies concluded overseas on the justification that it is in the best interest of the child. In *Re X & Y*, the court authorized payments, which evidently exceeded the expenses of the surrogate.<sup>286</sup> Similarly, the courts in *Re L (a minor)*<sup>287</sup> and *X and Y (Children)*<sup>288</sup> authorized a commercial surrogacy on the justification that the approval was in the best interests of the child, otherwise the child would be rendered stateless.<sup>289</sup> In fact, there is no one reported case where the courts declined approving an arrangement due to the payment of unacceptable large sum of money to the surrogate mother.<sup>290</sup>

---

<sup>283</sup> *Re X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) see Claire Denton-Glynn and Jens M, p. 3.

<sup>284</sup> The Human Fertilisation and Embryology (Parental Orders) (Consequential, Transitional and Saving Provision) Order 2010,

<sup>285</sup> Claire Denton-Glynn and Jens M (n 265) p. 2.

<sup>286</sup> *Re X & Y (Foreign Surrogacy)* [2008] para 24.

<sup>287</sup> *Re L (a minor)* [2010].

<sup>288</sup> *X and Y (Children)* [2011].

<sup>289</sup> Mandeep Borkataky, ‘Is the law regulating surrogacy in need of reform?’ (2015) Online Journal <[https://www.researchgate.net/publication/277300043\\_Is\\_the\\_law\\_regulating\\_surrogacy\\_in\\_need\\_of\\_reform](https://www.researchgate.net/publication/277300043_Is_the_law_regulating_surrogacy_in_need_of_reform)> Accessed on 6<sup>th</sup> November 2018.

<sup>290</sup> *Re Q (Parental Order)* [1996]. See The Brazier Report, para 5.3.

The UK's position on commercial surrogacy has lost touch with the practice and largely, it can no longer effectively enforce the ban. The Brazier's report had initially foreseen challenges of enforcing the ban as evidence showed that it was increasingly practiced on commercial basis.<sup>291</sup> For starters, the practice of surrogacy in the UK has made it difficult to distinguish between altruistic surrogacy from commercial surrogacy, rendering the ban on commercial surrogacy toothless.<sup>292</sup> The parties have circumvented the ban on commercial surrogacy by making payments which are over and above the reasonable expenses in the name of the legitimate and legal payments.<sup>293</sup> Prohibiting agencies from offering their services on a paid basis has exacerbated the quality of services granted by COTS, which over relies on volunteers due to its inability to hire qualified professionals.<sup>294</sup>

The inefficacy of the UK law has had far-reaching effect with UK nationals opting for backstreet surrogacies or seeking surrogacy services elsewhere. The practice of leaving UK for surrogacy services has been so notorious that it has been listed as a ground for applying for a passport.<sup>295</sup> Further, a substantial number of parental orders is made yearly for surrogacy arrangements made and executed outside the UK.<sup>296</sup> Moreover, the UK nationals going abroad for surrogacy encounter serious challenges. Doing surrogacy across borders has logistic challenges, it is a costly affair and the commissioning parents have to wait longer for them to bring the child to the UK.<sup>297</sup> Further,

---

<sup>291</sup> Horsey, Kirsty and Sheldon, Sally 'Still Hazy After All These Years: The Law Regulating Surrogacy' *Medical Law Review* (2012) Vol. 20 (1) p. 71 & p. 75. See *Brazier Review*, para 5.4 and para 1.13.

<sup>292</sup> European Centre for Law and Justice, *Surrogate Motherhood: A violation of Human Rights* Report presented at the Council of Europe, Strasbourg, on 26 April 2012 p. 24.

<sup>293</sup> The Brazier Report (n 249) para 3.2.

<sup>294</sup> Horsey, Kirsty and Sheldon, Sally 'Still Hazy After All These Years: The Law Regulating Surrogacy' *Medical Law Review* (2012) Vol. 20 (1) p. 75.

<sup>295</sup> Claire Denton-Glynn and Jens M (n 265) p. 2.

<sup>296</sup> *Ibid.* In 2013, 69 out of 185 parental orders were made for children born outside the UK; 107 out of 258 in 2014 and 156 out of 281 in 2015.

<sup>297</sup> Helen Prosser and Natalie Gamble, 'Modern surrogacy practice and the need for reform' (2016) VI. 4 (3) *Journal of Medical Law and Ethics* p. 262.



the ban on commercial surrogacy has driven potential surrogate mothers from practicing the regulated surrogacy to backstreet surrogacies, which have the ripple effects of violating the rights of the surrogate mother and the best interests of the child.<sup>298</sup>

#### **4.3.5 Inefficiency of the UK Laws on International Surrogacy**

The UK regime does not have a sound legal framework on international surrogacy though UK courts recognize surrogacy arrangements concluded and executed in other jurisdictions. The UK does not have control over foreign surrogacy arrangements, but it assumes some authority once parties have executed their arrangement and the child is brought to UK for a parental order. Once the child is in UK and under the care of the commissioning parents, UK courts have no option than to grant the parental order, in pursuit of the best interest of the child.<sup>299</sup> However, this ‘after-fact’ regulation is not effective since it reduces the role of the courts to mere rubber-stamping, since they lack an opportunity to examine the contents of the surrogacy arrangements.<sup>300</sup>

---

<sup>298</sup> M Freeman, ‘Does Surrogacy Have a Future After Brazier?’ (1999) Vol.7 (1) *Medical Law Review* p 10.

<sup>299</sup> Claire Denton-Glynn and Jens M (n 265) p. 4.

<sup>300</sup> *Ibid*, p. 8.

## **4.4 THE LEGAL FRAMEWORK ON SURROGACY IN SOUTH AFRICA**

### **4.4.1 An Overview of the Surrogacy Laws in South Africa**

The South African regime is founded on five major principles; A mandatory judicial approval of the contract before conception of the surrogate mother, an investigative role of the court in approving the surrogacy arrangements, an automatic transfer of legal parenthood from the surrogate mother to the commissioning parents upon the birth of the child, a prohibition of commercial surrogacy, and a clear distinction between partial and full surrogacy. The surrogacy agreement must be in writing and must be entered into before the surrogate mother conceives the child. Legal parenthood under a surrogacy arrangement is vested to the commissioning parents automatically upon the birth of the child, unless the parties to the arrangement made a contrary arrangement. In addition, the regime makes a distinction between full and partial surrogacy, the basis upon which it creates special rights for partial surrogacy.

South African courts play a central pre-approval role in the formation and recognition of surrogacy arrangements. The regime has incorporated a mandatory court procedure, where the courts act as screening devices in determining whether a proposed surrogacy arrangement should be approved or not.<sup>301</sup> For a South African surrogacy arrangement to acquire legal validity and enforceability status, a judge has to approve the proposed surrogacy arrangement before the surrogate mother conceives.<sup>302</sup> The judicial role of the judge is more comprehensive since it includes investigative and discretionary powers, under which the judge may interrogate the inspirations behind the surrogacy arrangement, while certifying that the statutory pre-conditions have been satisfied.<sup>303</sup>

---

<sup>301</sup> Brunet, Laurence (n 237) p. 39.

<sup>302</sup> Ibid p. 40.

<sup>303</sup> Ibid p. 41.

Further, the regime provides for the particular factors which the court should consider when determining whether to approve or disprove the proposed surrogacy arrangement.<sup>304</sup>

The South African regime has adopted a very severe view on commercial surrogacy and it recognizes altruistic surrogacy only. The regime prohibits commercial surrogacy and any payments made to any third party, who might have participated in the initiation and the negotiation of the surrogacy arrangements. The law does not only prohibit payments to third parties for their involvement, but also payments to the surrogate mother. However, the law permits payments which cover the reasonable expenses incurred by the surrogate during the term of the pregnancy and costs incurred at childbirth.<sup>305</sup>

The court takes a very active investigative role in determining whether a particular arrangement is a commercial or an altruistic surrogacy arrangement. It is the duty of the court to investigate and confirm that there is no financial gain, which might characterize the arrangement as for commercial purpose.<sup>306</sup> In line with this duty, courts have imposed an extensive duty of disclosure on the parties to help it determine whether the particular arrangement is altruistic or not.<sup>307</sup> The duty requires the parties to disclose the circumstances under which they met any existing contract between the parties and an intermediary or between the surrogate mother and the intending parents.<sup>308</sup> In addition, the applicants must submit a detailed list of the surrogacy expenses.<sup>309</sup>

---

<sup>304</sup> Ibid p. 41.

<sup>305</sup> SA Children's Act s 301 (2).

<sup>306</sup> Caroline Nicholson and Andrea Bauling, 'Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?' (2013) Vol. 46 (2) *De Jure* p. 13.

<sup>307</sup> Ex parte WH 2011 6 SA 514 (GNP) 529C-D.

<sup>308</sup> Ibid, 531G.

<sup>309</sup> Ibid, 521C-D.

## **4.5 THE POSITIVE ATTRIBUTES OF THE SOUTH AFRICAN REGIME**

### **4.5.1 Legal Framework underpinned by Consultative Policy Framework**

The South African legal framework on surrogacy is founded and informed by a solid legal policy sanctioned by various constitutional commissions and reform commissions. The legal framework can be traced to the recommendations of the Law Commission, which did an investigation on the issues of surrogacy and whose report was published in 1992.<sup>310</sup> Owing to the risky nature of the procedures, coupled with the constant legal, medical and ethical issues, which keep arising, the commission recommended that surrogacy should be permitted for medical infertility and as a last resort.<sup>311</sup> The report was further interrogated in 1994, by a parliamentary committee which, while concurring with the commission's report on the idea that surrogacy should be preserved as a measure of last resort, further recommended that surrogacy should be accessible to single and unmarried persons, their sexual orientation notwithstanding.<sup>312</sup>

In addition, South Africa has a comprehensive and well-structured legal framework on surrogacy comprised of statutes, delegated legislations and case law. The two chief statutes are the Children's Act of 2005, the National Health Act of 2003.<sup>313</sup> These two acts have been amplified by the regulations relating to Artificial Fertilisation of Persons<sup>314</sup> and the three most celebrated cases in surrogacy.<sup>315</sup>

---

<sup>310</sup> South African Law Commission. *South African Law Commission Report on Surrogate Motherhood*. Pretoria: SALC, 1992.

<sup>311</sup> *Ibid.*

<sup>312</sup> Parliamentary Ad Hoc Committee. Report by the Parliamentary Ad Hoc Committee on the South African Law Commission Report on Surrogate Motherhood. Cape Town: PAHC, 1999.

<sup>313</sup> The Children's Act, No. 38 of 2005, and The National Health Act, No. 61 of 2003.

<sup>314</sup> Regulations Relating to Artificial Fertilisation of Persons GN R175/2012.

<sup>315</sup> *Ex Parte WH and Others* 2011 (6) SA 514 (GNP); *Ex Parte MS and Others* 2014 (3) SA 415 (GNP) and *AB and Another v Minister of Social Development* 2016 (2) SA 27 (GP).

#### **4.5.2 A robust and flexible jurisprudence on the interpretation of surrogacy laws**

The South Africa have generated a very robust and flexible jurisprudence, particularly on the genetic makeup of the child and the commissioning parents, marital status of the intending parent and their sexual orientation. The general rule is that the child must have a genetic connection with at least one of the commissioning parents<sup>316</sup> so that the court will not approve arrangements where none of them shares genetic make-up with the child.<sup>317</sup> On the other hand, however, there are exceptional occasions where the court can confer legal parenthood to commissioning parents at the time of birth, despite them not sharing a genetic makeup with the child.<sup>318</sup> Further, acquiring legal parenthood through surrogacy is open to single persons since the marital status of the commissioning person is irrelevant in the approval of the proposed surrogacy arrangement.<sup>319</sup> Similarly, surrogacy procedures are open to same-sex couples since the South African law treats homosexuality as a case of medical incapacity to procreate.<sup>320</sup>

#### **4.5.3 Optimal Protection for the Rights of the Parties to The Surrogacy Arrangement**

The South African regime offers maximum protection of the child as demonstrated by the legislative intents and the jurisprudence emanating from the courts. The best interest of the child is among the key factors to be considered when approving a surrogacy arrangement and whenever dealing with any issue emanating from the surrogacy arrangement.<sup>321</sup> Further, South African courts have adopted a robust interpretation of the threshold requirements with a to incorporate the best

---

<sup>316</sup> SA Children's Act of 2005 s 294.

<sup>317</sup> Meyerson "Surrogacy agreements in Murray" (1994) *Gender and the new South African legal order* p. 123.

<sup>318</sup> D W Jordan, 'Surrogate motherhood in illness that does not cause infertility' (2016) Vol. 106 (7) *South African Medical Journal* p. 685.

<sup>319</sup> SA Children's Act s 292 (1) (c).

<sup>320</sup> SA Children's Act s 295 (a).

<sup>321</sup> SA Children's Act s 296 (1)(a).

interests of the surrogate child. Even though the law requires that a surrogacy arrangement has to be approved before the conception of the child, the court in *Ex Parte MS*<sup>322</sup> authorized a surrogacy arrangement retrospectively where the parties had not sought the court's approval. Subsequent courts have been obliged to follow this precedent, if all the parties to the arrangement agree as to its contents.<sup>323</sup>

Further, it offers optimal protection to the rights of the intending parents, by guaranteeing certainty on the manner of acquiring parental rights under the surrogacy arrangement. To a great extent, the law prohibits the surrogate mother from making certain decisions, which will frustrate the rights and the legitimate interests of the intending parents. For instance, the law provides for an automatic transfer of legal parenthood of the child from the surrogate mother to the commissioning parents, relieving them of the burden of going for any additional court proceedings for adoption or parental order.<sup>324</sup> Further, the surrogate mother has no legal right to contact with the child, unless the parties made a contrary agreement under the surrogacy agreement.<sup>325</sup> Similarly, the surrogate mother does not have a right to terminate the contract upon conception.<sup>326</sup>

Furthermore, it places high premium on the rights of the surrogate mother, by granting her several rights, which to some extent buttress her fundamental freedom and human dignity. The court must be satisfied that she is in a good emotional state<sup>327</sup> and that there is a satisfactory psychological evaluation of the impact that the relinquishment of the child might have on her life.<sup>328</sup> Further, during the time of the pregnancy, she has a right to access medical care, the right to clothing and

---

<sup>322</sup> *Ex Parte MS and Others* 2014 (3) SA 415 (GP).

<sup>323</sup> Brunet, Laurence (n 237) p. 43.

<sup>324</sup> SA Children's Act s 297 (1) (a).

<sup>325</sup> Brunet, Laurence (n 237) p. 45.

<sup>326</sup> SA Children's Act s 297 (1) (e).

<sup>327</sup> National Health Act of 2003 s 7 (j) (ii).

<sup>328</sup> SA National Health Act 2006 s 11 (b).

the right to be compensated her loss of salary, wages or allowances occasioned by the pregnancy.<sup>329</sup> In addition, the surrogate mother has a right to do abortion but she has to inform and consult with the intending parents.<sup>330</sup> Furthermore, even though the law does not legislate on the age of the parties to the contract, courts have held that the commissioning parents have a duty to disclose any medical risks posed by the contemplated pregnancy to the health of the surrogate mother.<sup>331</sup>

The South African regime is responsive to the special concerns of surrogate mothers, especially where she is also the genetic mother. The framework is alive to the fact that a surrogate mother under a partial surrogacy has inherent property rights in the child, by virtue of her donated egg. On this ground, the surrogate mother is granted a cooling off period of sixty days after the birth of child, during which she can terminate the surrogacy arrangement and retain the child as hers.<sup>332</sup>

Further, a surrogate mother is required to have had a viable pregnancy, a successful delivery and a living child of her own.<sup>333</sup> In addition, the parties to a surrogacy arrangement must demonstrate that they have entered into the contract with an informed consent, without aspects of coercion or undue influence.<sup>334</sup>

#### **4.5.4 Insulation against Surrogacy Tourism and Professionalization of the Industry**

The south African framework insulates their systems from attracting surrogacy tourists and possible misuse by foreigners. The law places high premium on the domicile of the commissioning

---

<sup>329</sup> The intending parents bear the corresponding duty to ensure the enjoyment of these rights. See

<sup>330</sup> SA Children's Act s 300.

<sup>331</sup> *Ex parte WH* (2011) (6) SA 384 GNP.

<sup>332</sup> Julia Sloth-Nielsen, 'Surrogacy, South African style' (September 2013) *Family Law Newsletter* p. 20. See SA Children's Act s 298 (1).

<sup>333</sup> SA Children's Act of 2005 s 295 (c) (vi-vii).

<sup>334</sup> SA Children's Act s 293.

parents, but it also makes few exceptions to avoid injustice. The commissioning parents must have a domicile in South Africa thus curtailing persons from temporarily moving there for surrogacy services.<sup>335</sup> The law provides an exception on the domicile of the surrogate mother. Although the general rule is that the surrogate mother must be domiciled in South Africa, the court has discretionary powers to approve a surrogacy agreement where the surrogate mother is not domiciled in SA, provided parties can justify why they deserve the exception.<sup>336</sup>

In addition, the South African regime has addressed the potential health risks that come with the entire surrogacy process by underscoring the role of professionals in the preparation of surrogacy agreements. Specialized medical practitioners must do the assisted reproductive procedures at authorized fertility-institutions.<sup>337</sup> An experienced psychologist must do the mandatory psychological assessment on the surrogate mother.<sup>338</sup>

#### **4.5.5 Court's Social Engineering Role and the Efficacy of the regime in terms of Time and Costs**

The South African courts epitomize the role of courts in social engineering through their robust interpretation of the legislative provisions. They have particularly interpreted the threshold requirements in a manner that corresponds to the felt necessities and the emerging contemporary challenges. Although surrogacy is only permitted on medical infertility grounds, the court in *LS*<sup>339</sup> approved a surrogacy arrangement whose commissioning mother was fertile, but had a permanent

---

<sup>335</sup> Julia Sloth-Nielsen (n 332) pp. 18-20.

<sup>336</sup> SA Children's Act s 292 (2).

<sup>337</sup> National Health Act of 2003 s 9 (1).

<sup>338</sup> National Health Act of 2003 s 7 (j) (ii).

<sup>339</sup> High Court of South Africa, Gauteng Local Division, Johannesburg, Case No.: 2015/24392. (Unreported).



illness that had been medically certified that it would render her pregnancy a major risk to both her health and the health of the unborn child.<sup>340</sup>

The South African regime is the most efficacies in terms of costs and time. The courts approval of the arrangement means that parties do not have to engage in additional procedures to effect the transfer of legal parenthood from the surrogate mother to the commissioning parents after the birth of the child.<sup>341</sup> In addition, the conception must occur within eighteen months of the approval of the agreements, after which the consent of the parties to the agreement extinguishes.<sup>342</sup>

#### **4.6 THE NEGATIVE ATTRIBUTES OF THE SOUTH AFRICAN REGIME**

##### **4.6.1 The Inappropriateness of the courts as Screening Devices**

The appropriateness of the South African courts as the screening device has come under scrutiny, for lack of oversight authorities. Much criticism has been attributed to the recent case of *Ex Parte WH and Others* where the court approved a surrogacy arrangement in the most controversial circumstances in which it disregarded majority of the statutory threshold requirements.<sup>343</sup> For starters, the court readily bought the couples assertion that they were domiciled in South Africa, without providing a reasonable manner how it arrived at its conclusion that they were actually domiciled in South Africa.<sup>344</sup> The court did not question the origin of the gametes, it ignored to probe the payments of huge amounts of money to the surrogate mother, it did not interrogate the

---

<sup>340</sup> D W Jordan (n 318) p. 684.

<sup>341</sup> Brunet, Laurence (n 237) p. 40.

<sup>342</sup> Cornell Law School. International Human Rights Policy Advocacy Clinic and National Law University, Delhi, "Should Compensated Surrogacy Be Permitted or Prohibited?" (2017). *Cornell Law Faculty Publications* p. 29. See SA Children's Act s 296 (1) (b).

<sup>343</sup> Anne Louw, 'Surrogacy in South Africa: Should we reconsider the current approach?' (2013) Vol. 76 *Journal for Contemporary Roman Dutch Law* p. 574.

<sup>344</sup> Tanian Filander, 'The Enforceability of International Surrogacy in South Africa: How would a South African court proceed in determining an International Surrogacy case?' (LLM Thesis, University of the Western Cape, 2016) p. 73.

mother on the motivations to be the surrogate mother.<sup>345</sup> In addition, the court did not cross-examine the commercial interests of the surrogacy agency, which had brought the parties together.<sup>346</sup> Largely, this precedent belittled the instrumental role of the courts to a rubber stamp for any surrogate arrangement.<sup>347</sup>

#### **4.6.2 The Discriminatory Nature of Genetic Link Requirement**

The South African threshold requirement that there need be a genetic link between the child and at least one of the intending parents is discriminatory against infertile couples who must require a double notation and infertile singles. The threshold requirement that the child must be connected to one of the commissioning parents has been challenged for denying both infertile singles persons and infertile couples from assessing surrogacy.<sup>348</sup> It is alleged that this provision violates constitutionally guaranteed right to equality and human dignity.<sup>349</sup> The requirement has been declared unconstitutional for being a violation to the right to human dignity, individual autonomy, equality and privacy.<sup>350</sup> Further, this requirement discriminates against mothers and single persons who, although they are fertile, they have a permanent illness which renders her pregnancy a substantial peril to her health and the health of the unborn child.<sup>351</sup>

---

<sup>345</sup> *Ex parte WH* 2011 6 SA 514 (GNP) para 67.

<sup>346</sup> Paras 13 and 30.

<sup>347</sup> *In re Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ) para 12.

<sup>348</sup> BiLLin BCN, 'South Africa Surrogacy Law Challenged' Sensible Surrogacy (October 17 2014). <<http://www.sensiblesurrogacy.com/south-africa-surrogacy-law-challenged/>> Accessed on 5<sup>th</sup> November 2018.

<sup>349</sup> Liesl Smit, 'South Africa's surrogacy laws challenged' Capetalk (October 15 2014). <<http://www.capetalk.co.za/articles/457/south-africa-s-surrogacy-laws>> Accessed on 5<sup>th</sup> November 2018.

<sup>350</sup> *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* (40658/13) [2015] ZAGPPHC 580.

<sup>351</sup> *D W Jordan* (n 318) p. 685.

### 4.6.3 Stand on Commercial Surrogacy and International Surrogacies

The South African's stand on commercial surrogacy has been constantly criticized as paternalistic and unjustified. Most critics perceive the ban as a violation of the women's freedom to control their lives and as being old-fashioned with respect to the major developments on commercialization of surrogacy in other jurisdictions like India. Some argue that the ban limits the surrogate mothers enjoyment of the constitutional right to engage in an economic activity.<sup>352</sup> Other argue that it is simply difficult to enforce the ban since the parties might easily legally convert the illegal payments into lawful ones by including the payments as legitimate and legal payments to the surrogate mother.<sup>353</sup> More still, it has been argued that the ban might encourage backstreet surrogacies driving the practice underworld.<sup>354</sup>

The South African law does not recognize international surrogacy arrangements. Generally, the South African regime is self-centered, as it does not recognize surrogacy arrangements concluded in other jurisdictions, neither does it allow foreigner to benefit from their regulations, without some level of connection-domicile.<sup>355</sup> Further, South Africa does not have any arrangements with other countries, in the form of international or bilateral conventions, through which a South African surrogacy arrangement can acquire recognition in the foreign jurisdictions. The lack of a legal framework on international surrogacy arrangements played out in the *Ex parte WH*, where the commissioning parents, who domiciled in South Africa, could not acquire parental status in their respective countries of birth.<sup>356</sup> This stance poses a serious challenge and a grave violation of the

---

<sup>352</sup> Cockrell "The law of persons and the Bill of Rights" in *Bill of Rights compendium* (1996) para 3E38.

<sup>353</sup> Anne Louw (n 343) p. 582.

<sup>354</sup> Freeman 1999 *Medical Law Review* p. 20

<sup>355</sup> Anne Louw (2009) p. 337

<sup>356</sup> Anne Louw (n 343) p. 588.

rights of the surrogate child, since it will not be legally recognized, as a child of the commissioning parents, might be stateless and without a nationality.<sup>357</sup>

#### **4.7 Conclusion**

Both the UK and South Africa jurisdictions have shared similarities especially on the prohibition of commercial surrogacy. Similarly, the two jurisdictions are facing similar challenges, especially for being discriminatory against single persons and barren couples, and their failure to legislate on international surrogacies. In addition to these challenges, the two jurisdictions are grappling with the ban on commercial surrogacy, which has become very difficult to enforce due to challenges in distinguishing it from altruistic surrogacy. The South African experience offers good lessons for Kenya to emulate, especially on the pre-approval role of the courts in which they act as effective screening devices and the optimal protection of the rights of all the parties to the surrogacy arrangement. Most admirably, the South African jurisdiction provides for an automatic transfer of legal parenthood from the surrogate mother upon birth. UK jurisdiction has few lessons to offer to Kenya, considering the discriminatory manner of issuing the parental orders and the lengthy process of transferring legal parenthood from the surrogate mother to the commissioning parents.

---

<sup>357</sup> Tanian Filander (n 344) p. 76.

## **CHAPTER FIVE**

### **5.0 CONCLUSIONS AND RECOMMENDATIONS**

#### **5.1 RESEARCH FINDINGS**

The researcher was concerned by the insignificant legislative developments in the regulation of surrogacy in Kenya, despite the fact that surrogacy practice has been in existence for the last ten years or more.

The objective of the study was three-fold. The first objective was to investigate the adequacy of the Kenyan legal framework with respect to surrogacy, while the second objective was to investigate the legal implications of the status of the law in this area, with respect to the protection and promotion of the constitutional rights to establish a family, the right to reproductive health and the right to privacy and human dignity. The third objective was to undertake a comparative analysis of the South Africa and the UK experiences on surrogacy regulation. This was done with a view to identify any lessons which might be borrowed by Kenya, in her pursuit of establishing a robust regime on surrogacy and one which is particularly at par with the best practices observed from other jurisdictions. The first two objectives were investigated under chapter three while the third objective was investigated under chapter four of the study.

The research proceeded on three hypotheses. The first hypothesis was that Kenya does not have a law on surrogacy arrangements. The second hypothesis was that even though the Constitution provides for a framework on which surrogacy practice can be based, Kenyan legislative enactments do not explicitly provide for the right to practice surrogacy. Lastly, the study made a hypothesis that the South African and the UK experience on regulating surrogacy can offer meaningful lessons, from which Kenya can base her legislative agenda on regulating surrogacy.

The study confirmed the hypotheses in the affirmative. It revealed that the Kenyan legal framework on surrogacy is inadequate and it does not protect nor promote the constitutional rights to form a family, right to reproductive health and the right to human dignity and privacy. Similarly, the study confirmed that both South Africa and the UK have sound regulatory regimes on surrogacy, from where Kenya can borrow with a view to legislate on surrogacy.

With respect to the first objective on the efficacy of the legal framework, the study revealed that the surrogacy practice has constitutional foundations under the Constitution, particularly the right to family, the right to access and utilize assisted reproductive technologies and reproductive health care, and the constitutional right of a child under the 'Best interest of the child principle.' In addition, also relevant is the constitutional right to dignity and privacy. Apart from the Constitution, the Kenyan surrogacy practice is also sanctioned, though impliedly, by other international human rights instruments, which Kenya is party to especially the Banjul Charter, the ICESCR and the UN Convention on the Rights of the Child.

The presence of this constitutional framework notwithstanding, the Kenyan legal framework is grossly inadequate and it is out of touch with the societal most felt necessities, with respect to embracing the new technological reproductive methods. Although the constitution has provided an adequate framework on which surrogacy regulations can be based, there are no legislative enactments on surrogacy, and particularly on the rights, duties and the responsibilities of the respective parties in a surrogacy arrangement. Largely, the practice operates under the shadow of the Children Act, the Birth and Death Registration Act both of which do not recognize surrogacy arrangements nor confer special rights and duties to parties in a surrogacy arrangement.

The themes underlying under these three statutes represents the orthodox way of conception, and they do not reflect the contemporary conceptions through assisted reproductive processes. The Children's Act, which is the major legislation on children does not provide for surrogacy, neither expressly nor by implication. In addition, the Act restricts the definition of a mother or father of a child to mean the genetic mother or father. The Birth and Deaths Registration Act operates under the fundamental assumption that the legal mother of a child is the woman who carries the pregnancy and bears the child. Although the spirits of these statutes is justifiable considering the times of their enactment, their utility of the underlying assumptions is now questionable, since they have lost grip with the advent of the new technological advancements and no longer in touch with the felt necessities of the modern day Kenyan society.

Consequently, the study revealed that the current surrogacy practice is majorly governed by a combination of the common law rules emanating from the Kenyan courts and the self-regulation, which has somehow managed to survive under the shadow of the law. Largely, the Kenyan courts have engaged in social engineering. They have severally recognized surrogacy arrangements as classical contracts, while at the same time calling upon the parliament to enact a national legislation on surrogacy.

With respect to the second objective, the study confirmed that the status of the law on surrogacy violates the constitutional right to a family, the right to access reproductive health care and the right to human dignity and privacy. The jurisprudence emanating from the courts is unstructured, characterized by conflicting interpretations of the place of surrogacy arrangements. In addition, Kenyan courts have severally gone ahead of parliament to circumvent the primary statutes on children judgments occasioning uncertainty on the status of the law.

The self-regulation model has been ineffective in protecting and promoting the constitutional rights of the parties to the surrogacy arrangement. The commissioning parents cannot directly acquire legal parenthood without doing child adoption under the Children Act. In addition, the commissioning parents are subjected to further procedures, which have to be done before the adoption process is done, especially the DNA test done on either of the parents to ascertain their genetic relation with the child. Further, inefficiency and ineffectiveness of self-regulation has been manifested by its inability to address and curb the rampant emergence of 'illegal surrogacies' in Kenya, through which parties undergo shorter and less demanding, but unlawful procedures of acquiring legal parenthood. These illegal surrogacies pose a grave threat to the violation of the constitutional rights, especially the newborn, whose interests are not represented in the whole dubious process.

With respect to the third objective, the study has revealed that Kenya has much to learn from the South Africa and the UK experience. The UK experience has several positive attributes, which would work for Kenya in her pursuit of establishing a sound legal framework on surrogacy. The UK regimes banks on concrete legislative, institutional and policy framework on which she has based her surrogacy laws. In addition, it offers maximum protection of the rights of the surrogate mother and same-sex couples. Further, UK has a robust approach which is not limited by the sexual orientation of the commissioning parents as it enables both heterosexual and same-sex couples to access surrogacy services.

On the other hand, Kenya may not learn much from the UK experience, considering the various legal challenges inherent in the UK regime, and which to a great extent occasion discrimination and human rights violations in the application, recognition and interpretation of the surrogacy arrangements. To some extent, the UK law on surrogacy has conflicting statutory provisions,



breeding uncertainty and unstructured jurisprudence on surrogacy. Further, the presence of multiple and sometimes-conflicting statutes has occasioned uncertainty on rights of parties to surrogacy arrangements. In addition, some UK laws on surrogacy do not represent the gradual revolution which has since been occurring over the years rendering the UK regime outdated and out of touch with the felt necessities of its subjects.

Furthermore, the UK regime involves more procedures and expenses in the transferring of legal parenthood from the surrogate mother to the commissioning parents, which mandatorily involves either the adoption process or obtaining the parental order. Further, the UK's position that there must be a genetic link between the child and at least one of the intending parents is discriminatory against infertile couples and single persons. In addition, the UK courts have generated an unstructured jurisprudence on the grant of parental orders, vitiating the key objective of the parental orders as a tool of regulating surrogacy. Still on the efficacy of the parental orders, they no longer play their intended role, since the courts are more inclined to grant a parental order, non-compliance with some statutory requirements notwithstanding. Lastly, the UK regime does not have a sound legal framework on international surrogacy. Even though the UK courts are willing to recognize the surrogacy arrangements concluded and executed in other jurisdictions, the UK courts have no control over foreign surrogacy reducing themselves into mere rubber-stamps. The best interest of the child takes paramountcy, forcing the court to recognize the arrangement for the sake of the child, thereby denying UK courts an opportunity to examine the contents of the international surrogacy arrangement.

South Africa experience offers more lessons to Kenya in her pursuit of establishing an ideal surrogacy regime. The South Africa regime offers a maximum protection of the rights of all the parties to the surrogacy arrangement. Its legal framework is based on a solid legal policy,

sanctioned by various constitutional commissions and reform commissions. It has a comprehensive and well-structured legal framework on surrogacy comprised of statutes, delegated legislations and case law. In addition, the South Africa courts have generated a very robust and flexible jurisprudence, particularly on the sharing of the genetic makeup of the child and the commissioning parents, marital status of the intending parent and their sexual orientation. Further, it offers optimal protection to the rights of the intending parents, by guaranteeing certainty on the manner of acquiring parental rights under the surrogacy arrangement.

Furthermore, it places high premium on the rights of the surrogate mother, by granting her several rights, which to some extent buttress her fundamental freedom and human dignity. The South African regime is responsive to the special concerns of surrogate mothers, especially where she is also the genetic mother. The South African framework insulates their systems from attracting surrogacy tourists and possible misuse by foreigners. Lastly, The South African regime is the most efficacies in terms of costs and time. The courts approval of the arrangement means that parties do not have to engage in additional procedures to effect the transfer of legal parenthood from the surrogate mother to the commissioning parents after the birth of the child.

These positive attributes notwithstanding, the South Africa experience might not offer meaningful lessons to the Kenya, considering some various challenges, which are undermining the efficacy of the regime. The appropriateness of the South African courts as the screening device has come under scrutiny, for lack of oversight authorities. The South African threshold requirement that there need be a genetic link between the child and at least one of the intending parents is discriminatory against infertile couples who must require a double notation and infertile singles. The South African law does not recognize international surrogacy arrangements. Generally, the South African regime is self-centered, as it does not recognize surrogacy arrangements concluded

in other jurisdictions, neither does it allow foreigner to benefit from their regulations, without some level of connection-domicile. This stance poses a serious challenge and a grave violation of the rights of the surrogate child, since it will not be legally recognized as a child of the commissioning parents, might be stateless and without a nationality.

## **5.2 RECOMMENDATIONS**

Based on the research findings, the study makes the following recommendations, which are designed to ensure the law catches up with technological advancements. The recommendations have been categorized in accordance with the various actors in the surrogacy practice.

### **5.2.1 Parliament**

#### **The Establishment of a solid policy framework on surrogacy**

It is recommended that the parliament should establish a solid policy framework on surrogacy. Chapter four revealed that the UK and South Africa bank on the presence of well-founded policies on surrogacy, on which they base their surrogacy regulation. Kenya can emulate this positive attribute by coming up with a solid policy framework on the repealing of the current laws, and the enactment of more responsive legislation on surrogacy. The study recommends the establishment of the various committees and taskforces, which should set the foundation on which the Kenyan legal framework on surrogacy will be established. These taskforces will purposely incorporate the Kenyan culture and values in into the impending legislations, with a view to avoid the temptation of simply transplanting legal rules from foreign jurisdictions without considering our unique circumstances.

#### **The Access of surrogacy services by Same-Sex Couples**

It is recommended that the parliament should enable the access of surrogacy services by same-sex couples. Chapter four revealed that both the UK and South Africa avail these services to both heterosexual and same sex couples. The guarantee of these rights irrespective of one's sexual orientation offers the maximum protection and promotion of human rights. Kenya can borrow this practice since it will be in conformity with the constitutional human rights provided for under the

Bill of Rights. The law should be amended and reformed, to the extent that same sex marriages are lawful in the first place, based on which these same-sex couples can access these rights.

### **5.2.2 Courts**

#### **The Kenyan courts should play an active role in the surrogacy process**

It is recommended that the Kenyan courts should play an active investigative role in the approval of a surrogacy arrangement. Chapter four revealed that the South African regime places high premium on the role of the court in the pre-approval process, before the surrogate mother conceives the child. This court screening process ensures maximum protection of the rights of all the parties to the surrogacy arrangement, and it ensures the practice is not exposed to exploitation for commercial purposes and satisfies the court that the arrangement has been made on purely altruistic grounds. Kenya can emulate this aspect of the South African regime. The study recommends that a law should be enacted granting the court special powers, through which it will interrogate the surrogacy arrangement before the surrogacy mother conceives the child.

### **5.2.3 Professionals, Hospitals and Doctors**

#### **Professionalizing the practice of surrogacy**

It is recommended that surrogacy procedures should be done under the watch of qualified and licensed medical practitioners. Chapter Four revealed that the South African regime insulates their surrogacy systems from attracting surrogacy tourists and possible misuse by foreigners by incorporating the role of professionals in the surrogacy process. Kenya can learn from this practice, since it ensures the practice remains ethical and is done in a manner that does not pose harm to the lives of the surrogate mother and the child. The study recommends that a new law should be enacted under which certified professionals actively take part in the entire process, and the

requiring that the assisted reproductive procedures must be done at authorized fertility-institutions by specialized medical practitioners.

#### **5.2.4 The role of Civil Societies**

It is recommended that the Kenyan civil societies should assume a central role in the regulation of surrogacy practice in Kenya. This role should be evident in their involvement in the creation of awareness and sensitization of the rights of parties to a surrogacy arrangement. Further, these societies should have a special place in the state agency responsible for regulation of surrogacy practice by forming part of its composition. In addition, these societies should take the lead in the public participation process, through which the ultimate legislation will be inclusive in a manner that responds to the peculiar cultural background and the felt necessities of the Kenyan people.

#### **5.2.4 International Communities**

##### **The Provision for the recognition of International Surrogacy arrangements**

It is recommended that International communities should establish a legal framework, through which partner states can recognize international surrogacy arrangements, especially those executed outside their jurisdiction. Chapter four revealed that both the UK and the South Africa are facing serious challenges for the lack of legal provisions enabling international surrogacy. These challenges pose a serious threat to the human rights of the child, who is not aware of the contents of the arrangement and was not a party to the agreement rendering them to the risk of being stateless. Kenya can learn from such by collaborating with other countries in the region and the world. This partnership should be cemented by bilateral treaties or international treaties, in the pursuit of a framework which recognizes international surrogacies and surrogacy arrangements entered and executed overseas by its nationals.

## 6.0 BIBLIOGRAPHY

### 6.1 Books

1. Eugene Cotran, *The Law of Marriage and Divorce* (1968)
2. Mill J. S, 'The Subjection of Women' in John M. Robson (eds), *The Collected Works of John Stuart Mill: Essays on Equality, Law and Education* (University of Toronto Press 1984)

### 6.2 Journals

1. Abby Brandel, 'Legislating surrogacy: A partial answer to feminist criticism' (1995) Vol. 54 (2) *Maryland Law Review*
2. Alcoff Linda, 'Cultural Feminist Versus Post structuralism the identity crisis of Feminist Theory' (1988) Vol.13 *Journal of Women in Culture and Society*
3. Amel Alghrani and Danielle Griffiths, 'The regulation of surrogacy in the United Kingdom: the case for reform' (2017) Vol. 29 (2) *Child and Family Law Quarterly*
4. Amy Garrity, 'A comparative analysis of Surrogacy Law in the United States and Great Britain-A Proposed Model Statute for Louisiana' (2000) Vol. 60 (3) *Louisiana Law Review*
5. Jackton B. Ojwang and Emily Nyiva Kinama, 'Woman-to-woman Marriage: A Cultural Paradox in Contemporary Africa's Constitutional Profile' (2014) Vol. 47 (4) *Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America*
6. Anton Van Niekerk and Liezl van Zyl, 'The ethics of surrogacy: Women's reproductive labour' (1995) Vol. 21 *Journal of medical ethics*
7. Carla Spivack, 'The Law of Surrogate Motherhood in the United States' (2010) Vol. 58 *The American Journal of Comparative Law*
8. Carole Pateman, 'Self-Ownership and Property in the Person: Democratization and a Tale of Two Concepts' (2002) Vol. 10 (1) *The Journal of Political Philosophy*
9. Claire de La Hougue and Caroline Roux, *Surrogate Motherhood and Human Rights: Analysis of Human, Legal and Ethical Issues* (2015) *European Commission Law Journal*
10. Colleen Sheppard, 'Feminist Pragmatism in the Work of Justice Bertha Wilson' (2008) Vol 41 (6) *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference*
11. Dinah Chelagat, 'Infertility in Africa: A great Manifestation of Gender Discrimination' (2017) Vol.22 (3) *IOSR Journal of Humanities and Social Science*
12. George P Smith, 'The Reasons Edge of Human Bonding; Artificial Fathers and Surrogate Mothers' (1983) Vol.55(1) *West New England Law Review*
13. 'International policy and practice' (2012) 34(3) *Journal of Social Welfare and Family Law*
14. Jackson Emily, 'UK law and international commercial surrogacy: 'the very antithesis of sensible'' (2016) Vol. 4 (3) *Journal of Medical Law and Ethics*

15. Janice Raymond, 'At issue: Reproductive Technologies, Radical Feminism and Socialist Liberalism' Vol.2 (2) 1989 *Reproductive and Genetic Engineering: Journal of International Feminist Analysis*
16. Kate Galloway, 'Surrogacy and dignity: Rights and Relationships' (2016) Vol. 4 (1) *Griffith Journal of Law & Human Dignity*
17. Katherine Baker, 'Property Rules Meets Feminist Needs: Respecting Autonomy by Valuing Connection' (1998) Vol. 59 *Ohio Law Journal*
18. Kermit Roosevelt, 'The Newest Property: Reproductive Technologies and the Concept of Parenthood' (1998) Vol. 39 *Santa Clara Law Review*
19. Kushal Singla, 'Legal Issues in Commercial Surrogacy: An Analytical Study' Vol. 2 (5) *International Journal of Law and Legal Jurisprudence Studies*
20. Laura R. Woliver, 'Reproductive Technologies and Surrogacy: Policy Concerns for Women' (1990) vol. 8 (2) *Politics and the Life Sciences*
21. M Crawshaw, E Blyth and O Akker, 'The changing profile of surrogacy in the UK – Implications for national and
22. Margaret Jane Radin, 'The Pragmatist and the Feminist' (1990) Vol. 63 *Southern California Law Review*
23. Mithomi Thiankolu, 'Towards a Legal Framework on Assisted Human Reproduction in Kenya: Some Thoughts on the Law, Technology and Social Change' (2007).
24. Monidipa Fouzder, 'Commission begins work on 'not fit for purpose' surrogacy laws' *The Law Society of England and Wales Gazette* (May 4 2018).
25. Rachel Kunde's ideas of surrogacy as a human rights are traceable from her article, 'Australian Altruistic Surrogacy: Still a way to go' (2015) Vol 3. *Griffith Journal of Law and Human Dignity*
26. Rosalind Pollack Petchesky, 'Reproductive Freedom: Beyond "A Woman's Right to Choose"' (1980) Vol. 5 *Signs*
27. Sarah Borden, "Edith Stein and Thomas Aquinas on Being and Essence," (2008) 82 *American Catholic Philosophical Quarterly*
28. Shoshana Gillers, 'A Labor Theory of Legal Parenthood' (2000) Vol. 110 *The Yale Law Journal*
29. Teresa Schon, Sabine Tagwerker and Magdalena Zabl 'International surrogacy arrangements and the establishment of legal parentage' (2015)
30. Thomas Sobirk Petersen, 'A Woman's Choice? On Women, Assisted Reproduction and Social Coercion' (2004) Vol. 7 (1) *Ethical Theory and Moral Practice*
31. Trimmings K, 'International Surrogacy Arrangement: An Urgent Need for Legal Regulation at the International Level' (2011) Vol.7 *Journal of Private International Law*.
32. Yehezkel Margali, 'From Baby M to Baby M(anji): Regulating International Surrogacy Agreements' *Journal of Law & Policy*



### 6.3 Special Papers

1. Nancy Baraza (Kenya Law Reform Commission) 'Family Law Reforms in Kenya: An Overview' Presentation at Heinrich Böll Foundation's Gender Forum in Nairobi
2. Francis Kariuki, 'Customary Law Jurisprudence from Kenyan Courts: Implications for Traditional Justice Systems'

### 6.4 LLM Thesis

1. Anne Casparson, 'Surrogacy and the best interest of the child' (Master's Thesis, Linköping University 2014)
2. Joan Oburu, 'Legal Parentage in Surrogacy Arrangement: An Immediate Concern in Kenya' (LLM Thesis, University of Nairobi 2016)
3. Robai Lumbasyo, 'Towards a Kenyan Legal and Ethical Framework on Surrogacy' (LLM Thesis, University of the Witwatersrand 2015)
4. Wathika Linda Wanjiku, 'The determination of Legal Parenthood Following Surrogacy Arrangements in Kenya' (LLB Thesis, 2017 Strathmore University)
5. Evelyne Opondo, 'The Legal Challenges of New Reproductive Technologies in Kenya' (Master of Arts Thesis, University of Nairobi 2010).

### 6.5 PhD Thesis

1. Aneesh V. Pillai, 'Surrogacy under Indian Legal System: Legal and Human Concerns' (PhD Thesis, Cochin University 2013)
2. Monicah Wanjiru Kareithi, 'A historical-legal analysis of woman-to-woman marriages in Kenya' (Doctor Legum (LL.D)University of Pretoria, 2018) p. 107

### 6.6 Reports

1. Brazier Report, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation*, Cm 4068 (1998) – hereafter 'The Surrogacy Review'
2. Brunet, Laurence, King, Derek, Davaki, Konstantina, McCandless, Julie, Marzo, Claire and Carruthers, Janeen (2012) *Comparative study on the regime of surrogacy in the EU member states*. European Parliament, Brussels, Belgium
3. Department of Health's consultation document, *Review of the Human Fertilisation and Embryology Act: A Public Consultation* (Department of Health, 2005).
4. Eva Palmqvist, 'Children's Rights in Kenya- an Analysis on the CRC Reports' (2006, Save the Children Sweden)
5. Kirsty, Natalie, Sarah, Louisa, Sarah (2015) *Surrogacy in the UK: Myth busting and reform* Report of the Surrogacy UK Working Group on Surrogacy Law Reform
6. Warnock DM, 'Report of the committee of inquiry into human fertilization and embryology' (Command of Her Majesty 1984)

## 6.6 Newspapers

1. Arthur Okwemba, 'A Surrogate mother speaks: I rented out my womb for Sh 650, 000' *Daily Nation* (Friday February 3 2012).
2. Benson Wambugu, 'A tale of two mothers and surrogate twins' *Daily Nation* (Saturday July 5 2014).
3. Eunice Kilonzo, 'For couples facing infertility, science offers a lot of hope in the form of assisted reproduction' *Daily Nation* (April 3 2018).
4. Horsey, K., 'A surrogacy conundrum that didn't need to be' *BioNews* (March 16 2015)
5. Mishcon De Reya, 'Single parents, surrogacy arrangements and parental orders: the current situation' *LexisNexis* (November 17 2017).
6. Rebecca Ridsdale, 'A brief history of surrogacy law in the UK' *VARDAGS* (February 13, 2018)
7. Sarah Cassidy, 'UK surrogacy laws must be reformed urgently, says leading fertility lawyer' *INDEPENDENT* (May 7 2015).
8. Stella Cheronu, 'Mombasa woman gives birth, gives away baby to Chinese' *Daily Nation* (July 31 2018).

## 6.7 Online Sources

1. Shodhganga<[http://shodhganga.inflibnet.ac.in/bitstream/10603/160789/14/09\\_chapter%2006.pdf](http://shodhganga.inflibnet.ac.in/bitstream/10603/160789/14/09_chapter%2006.pdf)> Accessed on 10<sup>th</sup> October 2018
2. OHCHR<<http://www.ohchr.org/Documents/Publications/NHRIHandbook.pdf>> Accessed on 27<sup>th</sup> June 2018.
3. HELSINKI<<https://blogs.helsinki.fi/seksuaalietiikka2011/files/2010/10/9-Liberal-Feminism.pdf>> p. 334
4. African Charter on the Rights and Welfare of the Child, Article 20. Also available at <[http://www.achpr.org/files/instruments/child/achpr\\_instr\\_charterchild\\_eng.pdf](http://www.achpr.org/files/instruments/child/achpr_instr_charterchild_eng.pdf)> Accessed on 23<sup>rd</sup> August 2018. Kenya ratified the Charter on July 2000.
5. African Commission on Human and Peoples' Rights, Ratification Table: ACHPR. Available at <<http://www.achpr.org/instruments/achpr/ratification>> Accessed on 5<sup>th</sup> August 2018. Kenya ratified this Charter on 23 January 1992
6. Feminist Jurisprudence: An Overview Cornell Law School <[https://www.law.cornell.edu/wex/feminist\\_jurisprudence](https://www.law.cornell.edu/wex/feminist_jurisprudence)> Accessed on 10th October 2018.
7. Office of the United Nations High Commissioner for Human Rights, *Reproductive Rights are Human Rights: A Handbook for International Human Rights Institutions* (2014)
8. Sandy Fleming, 'Evidence UK surrogacy laws are 'nonsensical'' *The UK's European University* (May 4 2016) <<https://www.kent.ac.uk/news/society/9727/kent-legal-expert-shows-uk-surrogacy-laws-have-become-nonsensical>> Accessed on 4<sup>th</sup> November 2018.
9. Sek Suaali, 'Feminism Liberal' *Online Journal*

10. Sheela Saravanan, 'Reproductive Justice and Transnational Feminism: Surrogacy in Germany and India' p. 11.  
<<https://pdfs.semanticscholar.org/presentation/c41d/f6d24106293c59fb3c1c494b9c65b76c5b61.pdf>> Accessed on 10<sup>th</sup> October 2017.
11. Siobhan Fenton, 'NHS hospitals forcing surrogate families to hand over newborn babies in car parks due to 'dire and outdated' laws' *Independent* (October 29 2016).  
<<https://www.independent.co.uk/news/uk/home-news/nhs-surrogate-births-rules-laws-parents-babies-handed-over-car-parks-a7381646.html>> Accessed on 4<sup>th</sup> November 2018.
12. Sonali Kusum, 'Commercial Surrogacy and Feminist Perspectives' (2013) Vol. 1  
*Karnataka Law Journal*.  
<[https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#\\_ftnref18](https://writingsonsurrogacy.wordpress.com/2016/10/18/commercial-surrogacy-feminist-perspectives/#_ftnref18)> Accessed on 10<sup>th</sup> October 2018.